MERIT SELECTION, ROLE ORIENTATIONS AND LEGAL RATIONALIZATION: A Q-TECHNIQUE STUDY OF THE FLORIDA STATE DISTRICT COURTS

BY

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To my parents

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Abstract of Dissertation Presented to the Graduate Council
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Seldom has the emergence of judicial merit selection at the state level been interpreted in the context of other judicial reforms. When so viewed, it becomes apparent that merit selection is but one aspect of a broader process of legal modernization. This process seems to be heading in the direction of Max Weber's ideal-typical rational legal system. Accordingly, judges selected by the merit plan should possess role conceptions which are amenable to a "rationalized" system.

To test this hypothesis, data on role orientations were collected from thirty-nine judges on Florida's District Courts of Appeals. In collecting these data, Q-technique was employed. The Q-technique involves the ordering of role statements by the respondents, according to levels of agreement and disagreement. After all respondents have completed

"Q-sorts," these sorts are inter-correlated and the resulting matrix factor is analyzed. Emerging factors correspond to different orientations to the judicial role.

A simple two-factor solution was adopted for the test of the hypothesis. This solution splits the sample of judges into two distinct orientations: the "rationalist" and the "realist." The rationalist judge fits the Weberian model in that he characterizes judicial decision-making in formalistic and legalistic terms. The realist, on the other hand, expresses doubt that judicial decision-making can or should be a process of formal rationality.

To test the hypothesis, the "collective" role orientations of merit selected, elected and appointed judges in the sample were compared mathematically. The results do not validate the research hypothesis.

In seeking to explain the negative results, discriminant analysis was employed to discover which variables actually account for variation in judicial role orientations. The analysis revealed that, while prior occupation is of little importance, a judge's age, length of service and the law school he attended are moderately useful in discriminating among judicial role types.

CHAPTER I
INTRODUCTION

During the 1976 presidential campaign, Jimmy Carter pledged that "during my administration, judges will be appointed on the basis of merit."[1] In an effort to fulfill this promise, the newly inaugurated president issued an executive order establishing a nominating commission for the purpose of filling vacancies on the United States Courts of Appeals.[2] His successor, expressing dissatisfaction with the operation of "merit selection" during the Carter administration, was quick to issue another order terminating the existence of the circuit court nominating commission.[3] Although Carter's innovations in the federal judicial selection process have been effectively undone by the Reagan administration, there remains widespread commitment to merit selection at the state level, which is where the concept was first applied.[4] Currently, thirty-one states employ merit selection for some or all of their judicial offices.[5] In the last decade alone, twenty-eight states adopted or extended their merit plans.[6]

Often referred to as the Missouri Plan, merit selection typically entails nomination of a small number of judicial candidates by a non-partisan commission, gubernatorial appointment of one individual from this set of nominees, and

a simple retention election upon expiration of the appointee's initial term. To avoid confusion, we will separate the initial selection and retention aspects of the process; indeed, these two aspects represent fundamentally different philosophies of political recruitment. Accordingly, this dissertation will employ the terms "merit selection" and "merit retention" and will not mean the former to encompass the latter. Our fundamental concern is with merit selection.

The Study of Judicial Selection Systems

A review of the literature on judicial selection indicates that there has been little work of a theoretical or empirical nature done in this area. By and large, the literature has an editorial tone with conclusions based more on ideology than systematic or balanced analysis. The few empirical studies in the area reflect an atheoretical character—most lack a conceptual framework for adequately interpreting the data they present.[7] The fundamental objective of this dissertation is to integrate the discussion of judicial selection into a larger theoretical perspective and to embark on an agenda of empirical research that is oriented toward theoretical understanding. The focal point of this study is the judicial role conception and its relationship to judicial selection mechansisms.

Many theoretical studies in the social science tend to be just that: theoretical analyses devoid of consideration

of empirical evidence. In this project we seek to unite the two levels of the scientific enterprise in order to produce a more complete intellectual product. Hence, we rely on general theory from which a specific hypothesis can be deduced and empirical data against which to test the validity of the hypothesis.

In his widely read Law in Modern Society, Roberto M. Unger asserts the importance of the phenomenological component in social research:

> The relationship between people's self-understanding in everyday life and the theorist's description or explanation of behavior brings us up against a riddle every bit as vexing as the puzzles which stem from the rivalry of the rationalist and historicist method. If we disregard the meanings an act has for its author and for the other members of the society to which he belongs, we run the risk of losing sight of what is peculiarly social in the conduct we are trying to understand. If, however, we insist on sticking close to the reflective understanding of the agent or his fellows, we are deprived of a standard by which to distinguish insight from illusion, or to rise above the self-images of different ages and societies, through comparison. Thus, subjective and objective meaning must somehow be taken into account. [8]

Accepting the utility of abstract and phenomenological studies, we employ methods characteristic of both approaches.[9] In keeping with the abstract-empirical approach, we utilize a highly structured survey instrument which is administered to a set of appellate judges. To investigate the "reflective

understanding" of this set of judges, we employ some general, open-ended questions designed to elicit from the judges their own perceptions of the issues at hand. With this dual approach, we hope to arrive at an understanding of judicial merit selection which is both systematic and realistic. Interestingly, we uncover some parallels between our theoretical explanation of merit selection and the explanations offered by our respondents.

Merit Selection and Legal Modernization

Seldom has the emergence of merit selection been viewed in the context of other judicial reforms. Clearly, the main force behind the adoption of merit selection has been the organized bar. Yet the bar has also been instrumental in securing a number of other related innovations. The campaign to eliminate lay judges, the movement to enhance the formal education of active judges, the institutionalization of judicial evaluation on "technical" criteria, court unification, the establishment of judicial disciplinary councils and similar reforms have all been vigorously promoted by the organized bar. It is our contention that these reforms reflect an underlying process of legal modernization and that the organized bar is the primary vehicle of such modernization.

Unfortunately, the concept of modernization is a rather nebulous one. Some writers employ the term "modern" to mean

simply the present.[10] Others identify modernization with progress.[11] Neither of these usages has any utility for theoretical or historical analysis. A more substantial definition is found in Walt Rostow's Stages of Economic Growth.[12] For Rostow, modernization involves industrialization and its various social, political and economic effects. Hence, we will use the term "modern" to refer to the legal systems of the industrialized nations. We recognize, however, that although nations like the United States have already experienced industrialization, this process is still having effects on social and political life. Thus, while the industrialization process may be substantially complete, the broader modernization process may not. The legal system of the United States is changing markedly and this change can be understood in terms of modernization theory.[13]

As yet the best treatment of legal modernization can be found in the classical sociology of Max Weber.[14] Weber was primarily concerned with the various types of authority systems and their relationships to forms of social and economic organization. He argued that the advancing industrial and capitalist economic forms are linked to a fundamental social process he termed "rationalization."[15] By rationalization, Weber meant an increase in the orderliness and predictability of social activity. This change is wrought by

the emergence of rationalism and science as modes of understanding and the concomitant decline of the magical world-view.[16]

Weber distinguished between formal and substantive rationality. "In Weber's view, this distinction is focal to sociological analysis. . . . The formal rationality of action refers to the degree to which conduct is organized according to rationally calculable principles. Thus the ideal-type of bureaucracy is, in terms of formal rationality, the most rational type of organization possible."[17] Substantive rationality organizes conduct on the basis of "ethical imperatives, utilitarian and other expediential rules, and political maxims, all of which diverge from . . . formalism. . . ."[18] Formal rationality, on the other hand, requires normative and organizational principles which are formal, positive and secular in nature.

For Weber, the most formally rational authority system is the "legal order" in which allegiance is owed not to ethical traditions or particular individuals but to positive law.[19] Once established, such principles are applied and enforced by officials specially trained in the "science" of law. Weber went on to elaborate the specific characteristics of the ideal-typical legal order. Basically, its traits are those of bureaucracy: hierarchy, division of labor, impersonality, routinization, meritocracy, and formality. Weber asserts that "the fully developed bureaucratic mechanism compares with other organizations exactly as does the

machine with the non-mechanical modes of production."[20] From a purely technical point of view, the bureaucracy is "capable of attaining the highest degree of efficiency."[21]

Weber's ideal legal system finds historical approximation both in the ancient Roman Law and in the modern legal systems of Europe which are heavily influenced by the Roman Law.[22] In both cases, the structure of the law itself is rigorously logical in that particular rules are deduced from general legal principles. Jurisprudence, the application of law to specific cases, is likewise deductive: judicial decisions are ideally mechanical operations involving no trace of the subjectivity of the decision-maker. The judges of the civil law (or Roman Law) tradition are thus viewed essentially as technicians, not politicians. They must undergo extensive legal training specifically attuned to the requirements of jurisprudence. Indeed, judging in the civil law tradition is a career not unlike the civil service in the United States.[23]

In sharp contrast to the European tradition, American judges have traditionally been viewed as politicians rather than as civil servants. They have typically come into judicial positions through election or a highly politicized appointment process. As we shall see in the following chapter, the organized bar has been steadily working to change both the popular image of the American judge and the methods by which judges are trained, selected, evaluated and disciplined.

In these efforts, the bar has been guided by the philosophy of "good government" born in the Progressive era.[24] In its emphasis on formality, meritocracy and professionalism, this philosophy resembles Weber's rationalist prescriptions. We shall refer to this philosophy as "progressive legalism," a term which captures the spirit as well as the substance of the belief system.

We argue that legal modernization in this country resembles Weber's process of formal rationalization. Accordingly, we shall employ the two terms interchangeably. We further note, with Schmidhauser, that rationalization is similar to the political scientist's notion of institutionalization, especially insofar as the subsidiary concept of role is concerned.[25]

Merit Selection, Legal Modernization and the Judicial Role Conception

One aspect of institutionalization concerns the role orientations of the actors operating in the particular institutional setting under study. The conventional wisdom sugfests that role orientations become regularized as institutionalization proceeds.[26] Thus an actor in the legislative context can be expected to espouse certain predictable conceptions regarding his role in the institution. Similarly, we know from a rather sizeable body of empirical research (which will be discussed later) that judges tend toward certain role orientations as well.

Under code law and the administration of justice within the civil law tradition, judges are expected to espouse a well-defined role conception. Like the ideal judge in the Weberian model, the civil law judge is expected to function as a bureaucrat—decisions are to be based strictly on legal principles without the taint of personal predilection or bias. It is, of course, open to debate how well European judges are able to meet this expectation.[27] But it is clear that such an expectation exists. In keeping with the Weberian model we have adopted, we can label this particular judicial role conception "rationalistic."

Given the experiential and incremental development of the common law,[28] we would not expect American judges to have traditionally espoused the rationalistic role conception. Clearly, gaps and conflicts in statutes and precedents have required discretion in many instances of judicial decision-making. Yet some elements in the legal community have persistently downplayed the substantive element in judicial decision-making. Whether pejoratively termed "mechanical jurisprudence,"[29] or championed under the banner of "neutral principles,"[30] there runs through the history of American jurisprudence the view that decisions can and should be based strictly upon legal criteria. Inasmuch as this view holds that judicial decisions are to be based on factors internal to the legal process, it is analagous to the legal rationalism of the civil law tradition. The common thread

running through all varieties of legal rationalism is the concern for order and predictability in the law. This concern comports well with Weber's notion of formal rationalization.

Stated generally, our hypothesis is that merit selection and the other associated judicial reforms indicate an underlying process of formal rationalization. As a form of institutionalization, formal rationalization at the structural level should be accompanied by rationalization of the role orientations of judges selected under a meritocratic form of recruitment. If this is so, the judges recruited under merit selection should profess roles amenable to a formally rational legal system. Thus, we would expect merit selected judges to emphasize legal order and predictability and minimize the importance of extra-legal factors in the decision-making process.

The Data Base

The empirical realm we have chosen for testing our hypothesis is the set of District Courts of Appeals of the State of Florida. This set of courts was chosen for theoretical and practical reasons. At the theoretical level, the most important consideration is the selection backgrounds of judges on these courts. Since Florida adopted merit selection for the District Courts in 1972, not all of the judges currently serving on these courts were originally merit selected. In fact, an appreciable proportion entered

the judiciary through the more traditional means of direct gubernatorial appointment and non-partisan election. As a result, we have a suitable laboratory in which to compare the role orientations of merit selected, appointed and elected judges without the problems associated with cross-state comparative research. These problems are discussed in Chapter IV.

Related to our choice of Florida's District Courts is the activity of the organized bar in Florida in the area of judicial reform. The Florida Bar has been quite active in pressing for all of the measures we have previously outlined as representative of legal modernization. Florida seems like a good example of a legal system that is moving in the direction of the Weberian ideal-type. Hence, if our hypothesized connection between merit selection and the rationalistic role conception is valid, then Florida is the kind of setting in which such a linkage should be observable.[31]

At the practical level, the Florida District Courts of Appeals are employed for reasons of accessibility and proximity to the University of Florida. This latter consideration is crucial given the temporal and monetary constraints on this dissertation research.

Methodology

It is important to emphasize at the outset that we are not approaching the study of judicial role orientations in the conventional manner. The orthodox approach is to employ role as a means of explaining variation in judicial

decision-making. Indeed, the judicial role orientation is conventionally viewed as important only insofar as it serves such explanation. Our goal here is not to explain behavior. Rather, we use the judicial role as a window through which to view changes in judicial structure and process. We are interested in the development of a mindset in which judicial role orientations comprise but one aspect. In short, we are viewing the rationalistic role orientation as an indicator of the effects of the legal modernization process on the Florida appellate judiciary.

During the period from January to July, 1981, interviews were conducted with thirty-nine of the forty-three judges then active on Florida's District Courts. Given this level of participation, we feel comfortable in making generalizations about this population of judges. The interviews consisted of two distinct phases. In the first phase, judges were asked general, open-ended questions about their attitudes toward and experiences with merit selection and other relevant reforms. In the second phase of the interviews, judges were administered psychological tests designed to measure their orientations to the appellate judicial role.

The psychological tests derive from Q-methodology,[32] which has already been employed in the study of the judicial role by Ungs and Baas.[33] Briefly, Q-methodology entails the meaningful ordering of a set of statements by a number of respondents, in this case judges. The resulting "Q-sorts"

are then intercorrelated and the matrix of correlations subjected to factor analysis. The emerging factors correspond to sorting tendencies among the respondents. In our context, the factors can be interpreted as different orientations to the judicial role. The nature of each orientation can be determined by examining the correlations of each statement in the "Q-sample" with each factor extracted. Using this procedure, we can develop a typology of judicial role orientations for our sample of judges. Once the role typology is constructed, we can then compare the distributions of different categories of judges across the typology. In this way, we will ultimately compare the "collective" role orientations of appointed, elected and merit selected judges from the Florida District Courts.

We are pleased at the level of cooperation we found among our respondents. Most of the judges were quite willing to construct Q-sorts, even though none had ever done so in the past. Indeed, it was gratifying that most of the judges were enthusiastic about the project in general. We are fortunate that the fabled "purple curtain" prevented us from collecting data in surprisingly few instances. Perhaps the importance of this traditional barrier to social science investigation of the judiciary is declining.

Organization of the Dissertation

The logic of our inquiry is as follows. First, the theoretical perspective adopted from Weber will be elaborated

and our research hypothesis deduced. With this conceptual framework in mind, we will then survey the development of judicial selection in the American states. In this chapter, special attention will be afforded the organized bar's role in the legal reform movement and to the philosophical controversy that pits progressive legalism against populist democracy. The following chapter surveys judicial selection research in political science and shows how this project fits into, and yet moves beyond, that body of work. In Chapter V we construct the empirical role typology for the Florida District Courts. We then use the distribution of the judges by selection mode to test our proposition that merit selected judges will tend to espouse rationalistic role conceptions. The concluding chapter considers alternative explanations for the empirical findings and points out directions for future research into merit selection and related innovations.

Notes

[1]Dorothy W. Nelson, "Carter's Merit Plan: A Good First Step," 61 Judicature 105 (1977), p. 105.

[2]Ibid.

[3]Mayo H. Stiegler, "U.S. Circuit Judge Nominating Commission Abolished by Reagan," 65 Judicature 44 (1981), p. 44.

[4]In 1940, Missouri became the first state to adopt merit selection of judges. See Glenn R. Winters, "The Merit Plan for Judicial Selection and Tenure—Its Historical Development," in Winters (ed.), Judicial Selection and Tenure: Selected Readings (Chicago: American Judicature Society, 1973).

[5]Larry C. Berkson, "Judicial Selection in the United States: A Special Report," 64 Judicature 176 (1980), p. 178.

[6]Ibid.

[7]This is a charge often leveled against judicial behavioralists. See, in particular, Theodore L. Becker, Political Behavioralism and Modern Jurisprudence (Chicago: Rand, McNally and Co., 1964), p. 9.

[8]Roberto M. Unger, Law in Modern Society (New York: The Free Press, 1976), p. 15.

[9]"Classical phenomenologists like Husserl and Merleau-Ponty stressed the importance of approaching phenomena without preconceptions. Explanations were to be constructed solely in terms of the statements actors made about the meanings of their own acts." Explications of the epistemological theories of Husserl and Merleau-Ponty can be found in Joseph J. Kockelmans (ed.), Phenomenology: The Philosophy of Edmund Husserl and its Interpretation (New York: Doubleday, 1967). See, in particular, chapters I, II and IX in Part I and chapter IV in Part II.

[10]Richard D. Brown, Modernization: The Transformation of American Life, 1600-1865 (New York: Hill and Wang, 1976), p. 3.

[11]Ibid.

[12]Walt Rostow, The Stages of Economic Growth: A Non-Communist Manifesto, 2nd ed. (Cambridge, England: Cambridge University Press, 1971).

[13]Robert J. Kramer, "The Politics of Legal Modernization: The Roman and Japanese Experiences," (Ph.D. dissertation, New York University, 1975).

[14]Max Weber, On Law in Economy and Society (Cambridge, Mass.: Harvard University Press, 1969).

[15]Max Weber, "Law, Rationalism and Capitalism," in C. M. Campbell and Paul Wiles (eds.), Law and Society (New York: Barnes and Noble, 1979), p. 73.

[16]Max Weber, From Max Weber: Essays in Sociology, trans. and ed. by H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), p. 51.

[17]Anthony Giddens, Capitalism and Modern Social Theory: An Analysis of the Writings of Marx, Durkheim and Max Weber (Cambridge, England: Cambridge University Press, 1971), p. 183.

[18]Max Weber, "Law, Rationalism and Capitalism," op. cit., p. 68.

[19]Ibid., p. 56.

[20]Gerth and Mills, op. cit., p. 214.

[21]Max Weber, The Theory of Social and Economic Organization, trans. A. M. Henderson and Talcott Parsons. (New York: Oxford University Press, 1947), p. 337.

[22]Max Weber, "Law, Rationalism and Capitalism," op. cit., pp. 68-70.

[23]John Henry Merryman, The Civil Law Tradition (Stanford: Stanford University Press, 1969), p. 36.

[24]Albert M. Kales, Unpopular Government in the United States (Chicago: University of Chicago Press, 1914).

[25]John R. Schmidhauser, Judges and Justices: The Federal Appellate Judiciary (Boston: Little, Brown and Co., 1979), pp. 5-7. The concepts of rationalization, institutionalization and modernization are inter-related but not necessarily synonomous. Institutionalization, according to Schmidhauser, involves delineation and maintenance of boundaries, regularization of norms and procedures and specialization of functions. Modernization describes the rationalization and institutionalization associated with industrialization. But institutionalization and rationalization have occurred in certain social structures prior to industrialization. The most obvious example of pre-modern institutionalization is the Roman Catholic Church. An example of pre-modern rationalization is the development of the Roman Law in the Age of the Republic.

[26]John C. Wahlke, et al., The Legislative System: Explorations in Legislative Behavior (New York: John Wiley and Sons, 1962), pp. 7-17.

[27]John Henry Merryman, op. cit., pp. 40-58.

[28]Gerth and Mills, op. cit., p. 217.

[29]Joel Grossman and Herbert Wells, Constitutional Law and Judicial Policymaking (New York: John Wiley and Sons, 1972), pp. 4-6.

[30]Jerold S. Aurebach, Unequal Justice: Lawyers and Social Change in Modern America (New York: Oxford University Press, 1976), pp. 260-261.

[31]In pursuing this course of investigation, the researcher faces a dilemna. In opting to study judges of different selection modes at one level of court within one state, we must necessarily choose a state in which merit selection has only recently come into being. This lack of a solid tradition may affect the result of the test of the research hypothesis. On the other hand, if we try to compare judges at different levels of court in one state or at one level between states, we run the risk of incommensurability due to varying judicial capacities, political cultures, etc. We have chosen the first approach primarily for the pragmatic reasons of proximity, accessibility and convenience.

[32]William Stephenson, The Study of Behavior: Q-Technique and its Methodology (Chicago: The University of Chicago Press, 1953).

[33]Thomas D. Ungs and Larry R. Baas, "Judicial Role Perceptions: A Q-Technique Study of Ohio Judges," 6 Law and Society Review 343 (1972).

CHAPTER II
MERIT SELECTION AND FORMAL RATIONALIZATION

An overview of the judicial selection literature reveals that merit selection is rarely viewed in the context of other judicial reforms.[1] When so viewed, it becomes apparent that merit selection is but one aspect of a more fundamental process—a movement led by the organized bar and justified by the philosophy of progressive legalism. The basic objective of this movement is the modernization of the judicial process. In this chapter, we will explore the modernization movement, and merit selection in particular, in light of Weber's concept of formal rationalization.

Traditionally, those political scientists who study the judicial process have eschewed any consideration of "grand theory" or social theory, categories in which Weber clearly belongs. Given the behavioralist's predilection for empirical testing of clear hypotheses, this aversion is understandable. Many of the postulates of grand theory operate at such a high level of abstraction that they are both difficult to operationalize empirically and perhaps intellectually unpalatable to those given to the pursuit of highly specialized research interests.

Yet for empirical research to be meaningful and coherent, it must be directed by some theory, even if implicit.

The best of the judicial behavior research to date draws rather explicitly from social-psychological theory in its use of role and attitude variables as determinants judicial decision making. It is the task of this dissertation to elevate the study of judicial selection to a theoretical level and thereby to develop a coherent empirical research agenda.

Our theoretical treatment of judicial selection begins with Weber, not arbitrarily but because his relevance to this subject is obvious to any reader with even cursory familiarity with his work.

Weber was interested in the relationships among forms of social order and economic structures. Unlike Marx, however, Weber rejected simple economic determinism: He sought to show that normative structures were more than epiphenomenal. Weber believed that existing normative structures can influence the economic evolution of a society as well as vice versa.[2]

Focusing on the concept of legitimacy, Weber produced an ideal-typology of legitimate authority systems: traditional, legal and charismatic systems.[3] The traditional authority rests on acceptance of norms "as they have been handed down from the past. . . ."[4] These norms are articulated and enforced by an individual or individuals who have inherited authority from their progenitors. The authority network thus depends on personal loyalty and a respect for the past. Monarchies

and some tribes fit into this category. So does the system of common law, which is created by the accumulation of determinative precedents.

The charismatic form of authority rests on deference to an exceptional individual who, in asserting his will, may explicitly repudiate the past.[5] Often the charismatic leader will be ascribed supernatural or other special powers. Clearly, many primitive tribes fit this type. So, however, do the regimes of some modern nation states. In this category, the Third Reich is clearly archetypal. Justice under the charismatic form of authority rests on the whim of the Kadi, the shaman, the chief or der Fuehrer.

The legal order is the most modern form of authority system. In this most modern of schemes, allegiance is owed not to particular individuals or sacred traditions but to a logical system of formal, positive law.[6] The characteristic political structure of such a rational authority system is, of course, bureaucracy. The administration of justice, of norm enforcement, is likewise bureaucratic.

Weber observes in the history of Occidental civilization a movement he calls "rationalization" —— a term which we can assume to mean a tendency toward greater levels of order, formality and predictability in all aspects of social life.[7] This rationalization is, according to Weber, related to the development of capitalism.

Predictability is the key to the mutual reinforcing nature of capitalism and legalism; predictability of business norm enforcement rationalizes individual risk-taking, which is the essence of the ideal market system.[8] The predictability of norms in the realm of business law and contract law spills over into the other substantive areas of law and, indeed, into other aspects of social life.

Weber noted increasing rationalization in religion, philosophy, the arts and the sciences as well as in law and political economy. The less basic of these, i.e., the arts, philosophy and religion are subject to periodic reactions in the form of romanticism; but the general tendency remains one of increasing abstraction, formalism and precision.[10] While experience since Weber's passing shows many romanticist reactions, the overriding and aesthetic mode of thinking in the Occident (and, increasingly, the Orient) remains decidedly rationalistic.

Our interest here lies with the justice system of the ideal type rational authority system. Not surprisingly, it is thoroughly bureaucratic:

> . . . every body of law consists essentially of a consistent system of abstract rules which normally have been intentionally established. Furthermore, administration of law is held to consist in the application of these rules to particular cases. . . .[11]

The administrative structure of the legal order is likewise bureaucratic. Weber outlines the criteria for the staff of the rational justice system:

> 1. They are personally free and subject to authority only with respect to their impersonal official obligations.
> 2. They are organized in a clearly defined hierarchy of offices.
> 3. Each office has a clearly defined sphere of competence in the legal sense.
> 4. The office is filled by a free contractual relationship. Thus, in principle, there is free selection.
> 5. Candidates are selected on the basis of technical qualifications. In the most rational case, this is tested by examination of guaranteed by diplomas certifying technical training, or both. They are appointed, not elected.
> 6. They are remunerated by fixed salaries in money, for the most part with a right to pensions.
> 7. The office is treated as the sole, or at least the primary, occupation of the incumbent.
> 8. It constitutes a career. There is a system of promotion according to senority or to achievement, or both. Promotion is dependent on the judgment of superiors.
> 9. The official works entirely separated from ownership of the means of administration and without appropriation of his position.
> 10. He is subject to strict and systematic discipline and control in the conduct of the office. . . .[12]

Bearing in mind that the above mentioned criteria apply to an ideal-type, let us consider how various contemporary legal systems approximate the rational model. Let us begin at the highest level-generality by comparing the basic characteristics of the common law and the civil, or Roman, law traditions vis-a-vis the Weberian ideal.

The civil law tradition, which embraces most nations in Europe and South America and many in Africa, is clearly the more rationalistic tradition. Most fundamentally, we note that the basic structure of the law and the method of jurisprudence employed are primarily deductive: there is an elaborate and logical corpus of positive law which is applied systematically to particular cases. Judges operating in such systems have less occasion to invoke precedent as a means of dispute resolution. The administration of the justice systems of the civil law tradition is also very bureaucratized. Judges are appointed on the basis of merit demonstrated through specialized formal education and examination; they rise through the judiciary in a manner not unlike civil servants in the United States; they serve as judges and only judges. In short, judging is viewed as a career rather than as a "political" position.[13]

The German legal system approximates the Weberian ideal-typical rational legal order. As in the case of its European neighbors, Germany's law is based on the Roman Law and the Napoleonic Code.[14] Between 1871 and the turn of the twentieth century, the German civil and criminal law was codified by teams of legal experts.[15] Although the criminal codes have been significantly revised since 1950, few changes have been made in the civil codes.[16] Although Germany professes to be based on the principle of federalism,

there is but one law that applies nation-wide.[17] In stark contrast stands the United States with its fifty-one bodies of positive law.

Another obvious contrast between German and American law is the absence of judge-made law in Germany, whereas the United States is based on the common law tradition. German judges thus, at least in theory, are not policy makers. David Conradt elaborates:

> This conviction that the judge is not an independent actor in the judicial process but merely an administrator lies at the base of the still dominant philosophy of legal positivism or analytical jurisprudence. Legal positivism contends that existing general law as found in the codes sufficiently encompasses all the rights and duties of citizens. In other words, judicial input or review is not necessary. The law supposedly offers the citizen the best protection against the arbitrary exercise of power by political authorities. Politics, according to this philosophy, must be kept strictly distinct from the law.[18]

The amenability of this legal positivism to National Socialism and other forms of statism is readily apparent. Indeed, as Conradt notes, legal positivism was criticized for facilitating the judiciary's "tragic, if not scandalous, behavior during the Third Reich. By claiming to be only neutral administrators of the law, German judges disclaimed any responsibility for judging the contents of the laws they were to administer."[19] But it must be equally apparent that legal positivism fits squarely into the tradition of Western rationalism — both in the Weberian and in the broader

philosophical senses of the term. Under a system of legal positivism, authority rests in a rationally constructed body of rules that transcend the authority of any personal political actor. The key concepts here are reason and transcendence.

When we examine the socialization and recruitment of the German judge, again we see the influence of rationalism. Again, we quote from Conradt:

> In Germany, as in other continental European states, there has been a traditionally close relationship between the court system and the state bureaucracy. Nearly all German judges . . . are appointed by the state ministers of justice. They are thus civil servants with roughly the same salaries, rank, tenure, and promotion structures as the Beamte in the higher service.[20]

Thus we see that the structure of law and the administration of justice in Germany are bureaucratized, rationalized. This is true, more or less, of the entire group of nations of the civil law or Roman Law tradition.

In contrast, the tradition of common law began as just that: a tradition. Beginning with the reign of Henry II of England, judges settled legal disputes by invoking "natural law" as they perceived it. Thus the corpus of the law grew incrementally as particular decisions were recorded and eventually codified. Although the United States is ostensibly a common law nation, the adoption of a national constitution and an elaborate body of statutes has formalized, and in some areas, superseded the precedents of the common

law. Thus, while stare decisis continues to be an important decisional criterion in the practice of jurisprudence, it has been subjugated to an appreciable and fairly comprehensive body of positive law.

In his study of the American federal appellate judiciary, Schmidhauser employed the Weberian theoretical framework. Indeed, to our knowledge, Schmidhauser is the only political scientist to explicitly make use of Weber in studying the courts.[21] We must note, however, that rationalization or bureaucratization "embodies many of the attributes which were . . . later adapted by modern American . . . political scientists as characteristics of institutionalization (notably boundary maintenance, regularization of procedures and ethical norms, and specialization of functions)."[22]

Schmidhauser finds that the "federal appellate judiciary meets many of the essential standards established in the model."[23] Yet, largely because of the "ascriptive factors and partisan influences" existing in the judicial selection process, Schmidhauser concludes that the system is not fully rationalized.[24]

When we look to the state level, however, we see considerably more progress toward the Weberian ideal than is evidenced by the federal system. In comparing Florida's judicial system with the aforementioned criteria for the rational justice system, we see considerable correspondence.

There is a streamlined hierarchy (court unification), a formal disciplinary body (the Judicial Qualifications Commission), merit selection (Missouri Plan) and retention (Missouri Plan). Given that merit retention practically assures incumbency, there is basis for arguing that the system is becoming more professionalized as well. Judging may be becoming more of a career in Florida, at least at the appellate levels. As of June 1982, formal evaluation and continuing formal legal education have been proposed by the organized bar, which in Florida is integrated.

It is clear that Florida and many states are modifying their judicial systems in ways predicted by Weber's theory of rationalization. But the changes and proposed changes that we have observed may only be superficial. Of great importance is whether these structural changes engender changes in court output, or the kinds of values that find their way into the law.

Critical theorists, following Marx, tend to view formal rationalization as mystification or obfuscation.[25] Rationalization, in this view, serves to mask the "underlying sources of social alienation and class-based power differentials. In particular, critics allege that the technical and formal characteristics of legal rationality actually conceal the social processes through which industrial capitalism is propagated."[26]

Certainly Weber believed that rationalization is related to capitalism, but his understanding of the relationship differs significantly from Marx's. Weber saw the emergence of capitalism, science, technology and legal order in the context of Western culture shaking loose the fetters of superstition, tradition and the magical world-view. What he describes is an advancing civilization attempting to use rational principles to re-order the natural environment, society and the human psyche. In The Protestant Ethic and the Spirit of Capitalism, Weber is careful to specify the mutually reinforcing nature of the various aspects of rationalization. Whereas Marx sees the "ideological" aspects as built on the substructure of capitalism, Weber views each of the aspects as relatively autonomous. Indeed, the contemporary critical theorists are not in agreement on the subject of relative autonomy.

To view rationalization as inexorably linked to capitalism, one must deal with the problem of the Soviet Union. Like most socialist states, the USSR has a legal system ostensibly patterned after the civil law tradition. Certainly the structure and administration of Soviet Law are highly bureaucratic. But the nature of jurisprudence differs from that of, say, France. Weber's distinction between formal and substantive rationality is useful here. The French style of jurisprudence is formally rational in

its reliance on formal rules of law as decisional criteria. The Soviet jurisprudence is more substantively rational in that it looks more to ideological principles as decisional guides than to formal legal rules.

Despite the distinction between formal and substantive rationality, it is clear that the Soviet system embodies many of the traits of the "legal order," at least as far as administration is concerned. This makes the thesis that rationalization is dependent on capitalism difficult to defend. In any case, such a thesis is beyond the scope of this research.

One does not have to accept the full-blown Marxist version to entertain the proposition that rationalization may be more myth-making than substance. Indeed, empirical studies have shown that merit selection, as a symptom of rationalization, does not affect court output. Neither does it seem to affect the social backgrounds of judges. These studies will be dealt with in Chapter IV.

Rationalization exists, if only in the minds of those actors who strive to modernize and reform the legal system. It was clear from our interviews with Florida appellate judges that there was a well-defined faction of "progressive," "rational," "predictable," and "orderly process" in characterizing merit selection and retention. Now it is obviously possible to claim that there is no guarantee that the judges

meant the same thing as we do, or as Weber does, when it comes to a term like "rational," for instance. As Wittgenstein pointed out, individuals have unique orientations to reality; hence to language.[27] One can hope for only a modicum of inter-subjectivity; this can arise only through common experience, language being one mode of experience. Our experience with Weber and with the appellate judges compels belief that the previously described faction among these judges is working toward court modernization along the lines that Weber expected and characterized as "rationalization". With the critical theorists, we retain a skepticism about intentions and functions that may not be superficially visible. We must emphasize, however, that the "progressive" judges almost without exception seemed very sincere in their faith in court modernization.

Perhaps a more empirically defensible form of hegemony is professional in nature. As lawyers, members of the bar have a certain intellectual self-interest in rationalization. Clearly, the rational lawyer will prefer an orderly and predictable legal system to one which is otherwise. In our interviews, we found several judges who pointed to and even criticized the bar's activities in judicial reform. But the majority of judges saw the bar's efforts in a favorable light. When we asked the question: "Do you feel that merit selection and retention give the bar undue influence over the judicial process?", most said "no". Some would admit a certain

influence, but felt this influence to be justified. Several adopted the rationalist position that judges must be legal experts recruited, trained and evaluated by legal experts. One can argue that legal rationalization serves the hegemony of the legal profession, but most of our respondents would be quick to repudiate such a thesis. They would be more inclined to see the professional influence as in the "public interest," a term frequently used by the judges we talked with.

To summarize, we have noted that the Weberian concept of rationalization bears much resemblance to the political scientist's concept of institutionalization. One aspect of institutionalization is the role conception or orientation of the actor operating in the institutional context. Pioneered by Wahlke, Eulau, Buchanan and Ferguson, in their study of legislative behavior,[28] role analysis has been more recently applied to judicial behavior.[29] However, we are aware of no research which has employed role analysis in a study of judicial selection modes and court modernization. With this theme in mind, we survey the development of judicial selection and the controversy surrounding the merit plan.

Notes

[1]An exception is James A. Gazell, State Trial Court as Bureaucracies: A Study in Judicial Management (New York: Dunellen Publishing Co., 1975).

[2]John R. Schmidhauser, Judges and Justices: The Federal Appellate Judiciary (Boston: Little, Brown and Co., 1979), p. 2.

[3]Max Weber, "Law, Rationalism and Capitalism," in C. M. Campbell and Paul Wiles (eds.), Law and Society (New York: Barnes and Noble, 1979), pp. 55-56.

[4]Ibid., p. 59.

[5]Ibid., p. 60.

[6]Ibid., p. 56.

[7]Max Weber, The Protestant Ethic and the Spirit of Capitalism. Translated by Talcott Parsons. (New York: Scribner, 1958), p. 13.

[8]Weber, "Law, Rationalism and Capitalism," p. 53.

[9]Ibid., p. 51.

[10]Ibid., pp. 51-52.

[11]Ibid., p. 56.

[12]Ibid., pp. 57-58.

[13]See John Henry Merryman, The Civil Law Tradition (Stanford: Stanford University Press, 1969).

[14]David P. Conradt, The German Polity (New York: Longman, 1982), p. 191.

[15]Ibid.

[16]Ibid.

[17]Ibid.

[18]Ibid., p. 192.

[19]Ibid.

[20]Ibid., p. 193.

[21]Schmidhauser, op. cit.

[22]Ibid., pp. 239-240.

[23]Ibid., pp. 241-242.

[24]Ibid., p. 241.

[25]Gerald Turkel, "Rational Law and Boundary Maintenance: Legitimating the 1971 Lockheed Loan Guarantee," 15 Law and Society Review 42 (1980-1981), p. 42.

[26]Ibid.

[27]Ludwig Wittgenstein, Tractatus Logico-philosophicus, 2nd ed. (New York: Free Press, 1971), p. 192.

[28]John C. Wahlke, Heinz Eulau, William Buchanan and Leroy C. Ferguson, The Legislative System: Explorations in Legislative Behavior (New York: John Wiley and Sons, 1962), pp. 7-9.

[29]The following chapter contains extensive references to studies of the judicial role.

CHAPTER III
THE DEVELOPMENT OF JUDICIAL MERIT SELECTION

Early History of Judicial Selection

The post-revolutionary American states inherited from Great Britain the practice of judicial appointment, although some states opted for legislative, rather than executive, appointment.[1] The Federalists, who almost without exception supported judicial appointment, regarded the masses as incapable of discerning the legal abilities of judicial candidates and justified their elitism by invoking the myth of mechanical jurisprudence, the notion that judges are mere instruments of the law—that personal policy preferences do not enter into judicial decision making.[2] Their argument was that since judges are not actually makers of governmental policy, there is no compulsion under democracy that they be popularly chosen; only policymakers require electoral sanction to claim legitimacy in their positions of authority.

The Jacksonian era brought a new method of state judicial selection. Jacksonians were very skeptical of the Federalists' claims for judicial neutrality and tended to see judges as inevitably involved in "politics." Hence, they were inclined to disfavor the practice of judicial appointment which, in their view, removed one policymaking

branch from the control of the electorate, thus rendering it illegitimate.[3]

In 1832, Mississippi became the first state to provide for popular election of all state judges. By action of its 1864 constitutional convention, the state of New York did likewise. In the century that followed, all states entering the union did so with constitutions providing for judicial elections.[4]

Toward the end of the nineteenth century there appeared much dissatisfaction with the elective scheme. Given the predilections of the Jacksonians, judicial elections had been partisan since their inception in the 1830s. The criticism that appeared before the turn of the century focused on the partisan aspect of the elective process.[5]

Most historians recognize that the industrial revolution and concomitant urbanization of the nineteenth century are closely related to the emergence of the powerful urban political machines. The Tammamy Hall organization in New York City exemplified the potential for abuse inherent in the partisan elective scheme. Tammamy seized control of the nomination process and, aided by the low voter turnout in judicial elections, was able to exercise virtual hegemony over the judiciary.[6]

Widespread dissatisfaction with partisan judicial elections was soon translated into concrete proposals for reform. Some clamored for a return to the appointive model while others sought means whereby the elective model could be improved. Among those following the second course was the

Association of the Bar of the City of New York, established in 1870, in part as a reaction against Tammamy Hall control of the judiciary.[7] The newly established bar association considered several reform proposals, all designed to "take the judge out of politics." These proposals included establishing separate judicial nominations and elections, direct primaries and non-partisan ballots.

Of the considered reforms, the non-partisan ballot gained the most support and was instituted on a limited basis in New York and in many states where Progressives dominated the legislatures. Non-partisan judicial election still operates in many states today.[8]

It was not long before the non-partisan scheme came under attack. At the vanguard of the assault on non-partisan election of judges was Roscoe Pound, then professor of law at the University of Nebraska. Pound argued that judicial elections, both partisan and non-partisan, were responsible for the low esteem in which the public held the courts.[9] William Howard Taft, in a speech before the American Bar Association in 1913, argued that the non-partisan ballot allowed unqualified individuals access to judgeships.[10] Taft asserted that partisan elections, despite their obvious flaws, at least provided screening mechanisms (party nominations) through which patently unsuitable candidates were thwarted in their bids to become judges. Leaders of the bar became increasingly convinced that, under the non-partisan scheme, incompetent and/or morally deficient

individuals became judges simply by virtue of possessing financial means and a modicum of voter appeal.

In 1913 the American Judicature Society was founded, ostensibly committed to the "improvement" of the administration of justice. The society's original "director of drafting" was Albert M. Kales, who had been professor of law at Northwestern University. Kales wrote prolificly, and in his articles there soon appeared a proposal for a new method of judicial selection. His model combined elective and appointive aspects in a novel way. The plan called for initial appointment by the chief justice of the state supreme court. The chief justice would himself be subject to periodic popular re-election. In order to avoid arbitrariness on the part of the appointed judge, Kales suggested that the judge face the voters in a non-competitive retention election.[11]

Inasmuch as the nominating commission aspect of the modern merit plan was not contemplated by Kales, nor was initial appointment by the governor, it is debatable whether we can credit Kales with inventing "merit selection." But clearly his ideas were profoundly influential in the development of judicial selection.

In 1922, the Illinois Constitutional Convention approved a plan involving gubernatorial appointment of Cook County trial judges.[12] The governor was required to choose appointees from a set of names produced by the state supreme court. Concurrently, the Louisiana legislature adopted a

similar plan.[13] These systems differed from modern merit selection in that they involved only judges in the nominating process.

In 1926, Harold Laski proposed gubernatorial appointment based on recommendations of an advisory council consisting of a supreme court justice, the attorney general and the president of the state bar association.[14] This proposal was extremely significant in that, for the first time, it was conceived that lawyers should play an active, institutionalized role in the judicial selection process.

Two years after the Laski proposal, Herbert L. Harley wrote in an editorial that the bar should be further involved in the nomination of judges and suggested that the list of nominees be based on a bar plebiscite.[15] Although Harley's proposal was never adopted by any state legislature, the spirit of his suggestion lives on in current efforts by state bars to influence voters in merit retention elections by evaluating judges through bar polls.[16]

It was in 1931 that the modern form of merit selection crystallized. Speaking before the American Judicature Society, Walker Spencer described the new selection plan in the following terms: "A commission composed of lawyers and laymen submits nominations to the governor for appointment subject to tenure by non-competitive election."[17]

In 1931, the American Bar Association officially endorsed the merit plan as enunciated by Spencer.[18] The ABA

lobbied heavily for merit selection in the state of Missouri and was successful. In 1940 Missouri became the first state to enact judicial merit selection. Missouri's merit plan applied to the state Supreme Court, the intermediate courts of appeals and trial courts in St. Louis and Kansas City.[19]

Since 1940, thirty more states have adopted some form of merit selection or retention.[20] Of course, there is considerable variation among these plans in terms of the composition of the nominating bodies, the applicability of the plans, the length of judicial tenures, the conduct of the retention elections and the formal roles of the state bar associations. Yet the constant that emerges from observation of the various plans is the participation in some form by the organized bar.

Judicial Selection in Florida

The state of Florida is fairly typical in terms of the evolution of its judicial selection practices. Before it was granted statehood, the territory of Florida was divided into a number of two judicial circuits with presiding judges appointed to two year terms by the president, subject to Senate confirmation. When Florida entered the union in 1845, it did so with a constitution calling for direct gubernatorial appointment of all judges. An 1853 constitutional amendment ushered in popular partisan election. Except for a brief interlude during and after the Civil War, judicial selection remained both electoral and partisan until 1971,

when the legislature acted to make all judicial elections in the state nonpartisan.

Before discussing recent judicial selection reforms in Florida, it is important to briefly outline the structure and function of the state court system. The present structure consists of the Supreme Court, with seven justices; five District Courts of Appeals, with a total of forty-three judges; twenty circuit courts, with a total of 302 judges; and 67 county courts, with a total of 198 judges.

The county courts are the lowest tier of trial courts in Florida. The county courts deal exclusively with misdemeanors and small claims and have no appellate jurisdiction. The county courts have absorbed the functions of the municipal courts, which were abolished in 1972 as part of a general restructuring and modernizing of the system. Formerly, the municipal courts handled petty crimes like traffic infractions. Today, the county courts' business is largely related to traffic violations.

The circuit courts have original jurisdiction over all felonies and those misdemeanors "that arise out of the same circumstances as those giving rise to a felony that is also charged."[21] The original civil jurisdiction of the circuit courts includes claims in excess of $2500, all matters of equity, all cases pertaining to juveniles, all matters of probate, determinations of competency, involuntary hospitalizations, the issuance of injunctions and all actions involving titles and real property. These courts also have

authority to issue the extraordinary writs: certiorari, mandamus, quo warranto, prohibition and habeas corpus. The appellate jurisdiction of the circuit courts is limited to appeals from the county courts.

The state constitution succinctly states the jurisdiction of the District Courts of Appeals, the intermediate appellate courts in Florida:

> 1. District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court . . .
> 2. District courts of appeal shall have the power of direct review of administrative action, as prescribed by general law . . .
> 3. A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof or before any circuit judge within the territorial jurisdiction of the court. A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction. To the extent necessary to dispose of all issues in a cause properly before it, a district court of appeal may exercise any of the appellate jurisdiction of the circuit courts.[22]

The Florida Supreme Court has mandatory appellate jurisdiction only in cases in which a lower court has imposed the death penalty or a lower court has invalidated a state law or portion of the state constitution. This narrow mandatory jurisdiction was accomplished by a 1930 constitutional amendment which rendered the bulk of Supreme Court appellate

review discretionary. As a result, the Supreme Court now focuses its attention on matters certified by the district courts to be of great import. Hence the District Courts of Appeals have been rendered more important as policy-making bodies in Florida.

In addition to hearing appeals, the Supreme Court is responsible for adopting the rules of procedure for all courts in the state, for overseeing the administration of the state judicial system, and for regulating the admission and disciplinary practices of the Florida Bar. In short, the Supreme Court is at the top of the judicial bureaucracy in the state of Florida.

The new state constitution of 1972 requires that, in the case of interim vacancies at all levels of the judiciary, the governor must make an appointment based on the recommendations of a judicial nominating commission composed of six lawyers and three laypersons. In 1976, another constitutional amendment extended the merit plan to cover all vacancies on the Supreme Court and District Courts of Appeals. Additionally, this amendment applied merit retention to the appellate courts.

The current situation regarding judicial selection is this: Supreme Court justices and judges of the district courts are merit selected and subject to merit retention. The judges of the trial courts are normally elected on non-partisan ballots, with merit selection applied in the case

of interim vacancies. In 1978 the voters rejected a proposed amendment that would have applied merit retention to the trial courts as well.

In terms of judicial qualifications, justices of the Supreme Court must have been members of the Florida Bar (membership is required to practice law in Florida) for at least ten years of bar membership. At the circuit court level, there is a five year eligibility requirement. At the county court level, there is no such minimum, although county judges must be members of the bar. Exceptions to this requirement are those judges who, in counties having populations less than 40,000, were incumbent at the time at which the law eliminating lay judges was enacted. At the time of this writing, 31 of the 198 county judges are not members of the bar. Interestingly, from our theoretical perspective, the Florida Supreme Court has established a voluntary program of legal education for the remaining lay judges. Probably related to political pressures, many of the non-lawyer judges have chosen to participate in this program.

Another modern feature of the Florida judicial system is the Judicial Qualifications Commission, a disciplinary council established by the new constitution of 1972. This body is designed to supplement the cumbersome and seldom invoked formal impeachment process. The commission confidentially investigates complaints of judicial malfeasance or incompetence. If it finds that the charges have basis in

fact, then the proceedings become public. By a recommendation of two-thirds of the commission members, the Supreme Court may reprimand or remove the offending judge. The high court may also order the retirement of judges with disabilities or personal problems that interfere with the performance of the judicial office. Since it began to function in 1973, the JQC has conducted 140 investigations, held twleve public proceedings, issued four reprimands, and removed six judges from office.[23] The JQC is composed of six judges from various levels of the system, two lawyers selected by the Board of Governors of the Florida Bar, and five lay members appointed by the governor.

This overview reveals that the Florida judicial system is highly modernized due to reforms mainly of the last decade. The structure of the system has been streamlined, merit selection and retention have been adopted, lay judges have been all but eliminated and a commission responsible for policing the system has been established.

At the forefront of these efforts to modernize the system has been the Florida Bar, which has engaged both in legislative lobbying and much "public education." Currently, the organized bar is working closely with the Supreme Court in order to develop an institutionalized judicial evaluation mechanism which would take the place of the currently employed informal bar poll conducted just before merit retention elections. The adoption of such a formal device for

assessing judicial performance would bring the Florida court system closer to the Weberian idealized rational system.

From talking to leaders of the Florida Bar and judges and justices who are reform oriented, it is possible to detect a relatively coherent philosophy. This philosophy, which we have designated "progressive legalism," is primarily concerned with the technical aspects of judicial performance and administration and downplays the political elements inherent in the judicial process. Indeed, where "ploitics" are perceived to operate in the system, the legal community invariably takes steps to minimize the appearance of same.

Merit selection, then, is but one aspect of an underlying process of formal rationalization, a process directed by lawyers and justified by the tenets of progressive legalism. There are those, of course, who are skeptical of the bar's efforts in this area. Hence, merit selection and the associated reforms are still subject to controversy, both in Florida and nationwide.

The Debate Over Judicial Selection

The long-running debate over which method of judicial selection is "best" can be seen as a confrontation between the proponents of government by experts and proponents of populist democracy. The Federalists, in their espousal of judicial appointment and mechanical jurisprudence, are not wholly dissimilar from the Progressives who invented merit selection. Both clearly have elitist orientations toward

judicial recruitment. On the opposite side of the fence stand the Jacksonians, the Populists and all other majoritarian democrats.

It is unfortunate that the opponents in this controversy frequently talk past one another rather than arguing the merits of commonly understood propositions. A survey of this literature reveals disparate concerns on the parts of the participants. Progressive legalism, as we have designated the philosophy of the supporters of merit selection and relevant reforms, is primarily concerned with the "quality" of judges and, ultimately, justice itself. The "political tradition," comprising the various opponents of the Missouri Plan, focuses almost exclusively on the issues of accountability and control.[24]

The thrust of the progressive legalistic perspective on judicial selection is that the judiciary is increasingly in need of highly trained experts in law who can cope with the enormous intellectual tasks imposed on the courts by advanced industrial and technological society. The old system of elections, especially partisan elections, discourage "the best qualified from candidacy,"[25] and give the voters a choice "only among mediocrities."[26]

The belief is that the most able among potential judges will eschew the ordeals associated with campaigning: public appearances, "gladhanding," fundraising and the inevitable anxiety about what substantive issues may be ethically addressed in a judicial campaign.

Yet even if demonstrably qualified individuals should, despite the political morass, occasionally appear on ballots for judicial posts, there is no reason to suppose that the voters would be able to identify them. As several judges on Florida's appellate courts noted, elections for trial judgeships in Dade County often have more than a dozen candidates. In these cases, it is the judge at the top of the ballot who has the greatest chance of winning. We know of no empirical confirmation of this tendency, but it is obviously a salient consideration among many of Florida's appellate judges.

Furthermore, the progressive legalist will argue, judges must be independent of the popular will so that they can follow the dictates of law rather than majority sentiment. Merit selection is favored because, in addition to selecting more qualified judges, it depoliticizes the selection process. Of course, nobody believes that merit selection is wholly devoid of politics. But some believe that the politics of the bar are preferable to the politics of parties.

The progressive legalist will further argue that the efficiency of the administration of justice can be enhanced by merit selection because the judge will "devote his entire attention to the business of his court, since he will not be permitted to take part in political campaigns."[27] This is another interesting claim which has, to our knowledge, not attracted empirical research.

The image of the courts possessed by the ideal typical progressive legalist is that of the fully independent, autonomous, apolitical, professional, meritocratic judiciary. Those who oppose merit selection often possess a very different image of the courts, as we shall see.

The most salient criticism of merit selection is that it removes from the people their sovereign right to elect all leaders, including purportedly "apolitical" judges. Though Progressives are often thought to espouse "good government," populists consider a government that is closer to the people to be "better" than one that is independent and detached from popular sympathies.

Opponents of merit selection are also apt to be skeptical about the role of the organized bar in the Missouri Plan. Obviously the central feature of merit selection, the judicial nominating commission, is dominated by lawyers. In most states using merit selection and certainly in Florida, nominating commissions are primarily composed of lawyers. Given the observed tendency for professions to control their workplaces, there may be professional self-interest lurking behind the bar's involvement in the judicial selection process.[28]

In the previously described interviews with Florida appellate judges, we explored the jurists' sentiments on these fundamental issues of judicial selection.

We must stress at the outset that the thirty-nine judges we interviewed were not of one mind on these issues.

After several months had passed during the interview stage of this research project, we discerned two distinct camps among the appellate judges. By far the larger camp was comprised of the proponents of merit selection who also tended to favor the other reforms we have characterized as symptomatic of progressive legalism. The minority camp opposed merit selection (and generally retention as well) and was skeptical about the reform activities of the Florida Bar. Not surprisingly, this cleavage is related to the mode of selection of the judges in our study. Table I presents binomial responses of the judges to selected questions on judicial selection. Binomial categorization is inferred from verbal responses to open ended questions. In most cases, this was easy. The judges we interviewed by and large had strong opinions pro or con on these issues.

Among those less sanguine about merit selection were several judges who criticized the "elitist politics" of the Florida Bar. One judge in particular, a self-proclaimed Jacksonian, seemed quite incensed by the existence of judicial nominating commissions. Like the ideal type Jacksonian discussed earlier in this chapter, he spoke of the "infringement of a sovereign right of the people."[29]

Other judges in the "skeptical" camp objected neither to the bar's role in selection nor to the infringement of an alleged right. Rather they pointed to the vestiges of partisan politics that tainted the reformed system. Several

Table I

Responses of Judges on Florida District Courts of Appeal to Questions on Judicial Selection, by Mode of Selection

Question:	Merit Selectees			Others*		
	YES	NO	N	YES	NO	N
Do you favor merit selection of judges on the appellate courts?	92% (24)	8% (2)	(26)	69% (9)	31% (4)	(13)
Has the implementation of merit selection improved the quality of judges selected to the appellate courts?	78% (18)	22% (5)	(23)	55% (6)	45% (5)	(11)
Has the implementation of merit selection significantly depoliticized the selection process?	65% (13)	35% (7)	(20)	17% (2)	83% (10)	(12)
Does merit selection provide the organized bar with undue influence over the judicial system?	25% (3)	75% (9)	(12)	13% (1)	87% (7)	(8)

Note: N varies over questions due to temporal constraints of interviews.

*Includes judges selected by gubernatorial appointment and non-partisan election.

talked of "subtler" and "more sophisticated" forms of campaigning and patronage.

Several of the elected judges pointed out that since the inception of merit selection, nearly all judges selected have been of the same political party (Democrat) as the appointing governor. Furthermore, they cited several examples of merit selected judges who had previously campaigned for or otherwise assisted the governor that appointed them. It seems then that, despite some judges' rhetoric to the contrary, merit selection has not eliminated all elements of partisan politics from the judicial selection process.

The proponents of merit selection tended to emphasize the judicial competence or quality factor. As Table 1 shows, merit selected judges were more inclined to the view that merit selection improves the overall ability of the judicial system. However, it was an elected judge who assured us that "based on personal experience, it is true" that merit selection has improved the caliber of judges recruited. Subsequent investigation revealed that one of this judge's colleagues had just retired after engaging in some dubious administrative behavior.

When questioned about the nature of judicial competence, most of the judges agreed that it is not something that is amenable to simple measurement and that it takes much legal and/or judicial experience to detect and evaluate competence. Invariably, the merit selected judges were confident

that the lawyer-dominated judicial nominating commissions were capable of such judgments. Many assured us that "these commissions, even the lay members, take their jobs very seriously." Several of the judges explained that the commissions prepare comprehensive profiles of candidates' legal experience, personal and professional reputations, community service records, characters, etc. Past partisan political activity was seldom mentioned.

Given the fact/value separation, it is obvious that no amount of empirical evidence can resolve the fundamental philosophical questions attendant on this controversy. The issue of judicial quality is the prime case-in-point. It is highly doubtful that the opponents in this controversy could ever agree on a set of operations that measure judicial quality. Many indicators have been proposed; none has proved satisfactory to all parties. Given the lack of concensus, researchers must confine inquiry to less salient and politicized concerns.

There are many empirical issues raised by both sides of the judicial selection debate. Although empirical evidence cannot resolve fundamental philosophical differences, it can render some questions relevant and others irrelevant. It can clarify positions and demonstrate likely practical consequences of adopting either position. For these reasons, let us survey the literature in which political scientists attempt to make factual and theoretical contributions to the study of judicial selection.

Notes

[1]Glenn R. Winters, "Judicial Selection and Tenure," in Glenn R. Winters (ed.), Judicial Selection and Tenure: Selected Readings (Chicago: American Judicature Society, 1973), pp. 21-22.

[2]A concise treatment of "mechanical jurisprudence" as propounded by John Marshall and its relationship to the selection and impeachment processes appears in Alpheus T. Mason and William M. Beaney, American Constitutional Law: Introductory Essays and Selected Cases, sixth ed. (Englewood Cliffs, N.J.: Prentice-Hall, (1978), pp. 23-24. For an explanation of how the economic and political elitism of the Federalists colored the language of the Constitution and the early philosophy of jurisprudence in this country, see Charles Beard, An Economic Interpretation of the Constitution (New York: Macmillan, 1962), pp. 7-18. The political utility of the "myth of mechanical jurisprudence" is examined in Joel Grossman and Herbert Wells, Constitutional Law and Judicial Policy Making (New York: John Wiley and Sons, 1972), pp. 4-6. Other relevant sources are Phillip Kurland, Politics, the Constitution and the Warren Court (Chicago: University of Chicago Press, 1970); Daniel Boorstin, "The Perils of Indwelling Law," in Wolff (ed.), The Rule of Law (New York: Simon and Schuster, 1971); Alexander M. Bickel, The Least Dangerous Branch (Indianapolis: Bobbs-Merrill, 1963) and Alexander Hamilton, The Federalist #78 (New York: New American Library, 1961).

[3]The literature addressing the issues of judicial independence and accountability is far too voluminous to be listed here in comprehensive fashion. For a good summary of the issues, see David Adamany and Phillip Dubois, "Electing State Judges," Wisconsin Law Review 768 (1976).

[4]Larry C. Berkson, "Judicial Selection in the United States: A Special Report," 64 Judicature 176 (1980), p. 176.

[5]Ibid., pp. 176-177.

[6]Allan Ashman and James J. Alfini, The Key to Judicial Merit Selection: The Nominating Process (Chicago: American Judicature Society, 1974), pp. 9-10.

[7]Richard A. Watson, "Judging the Judges," in Glenn R. Winters (ed.), Judicial Selection and Tenure, op. cit., p. 59.

[8]Berkson, op. cit., pp. 179-93.

[9]Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 20 Journal of the American Judicature Society 178 (1937).

[10]William Howard Taft, "The Selection and Tenure of Judges," 33 A.B.A. Report 418 (1913).

[11]Albert Kales, Unpopular Government in the United States (Chicago: University of Chicago Press, 1914). See, in particular, chapter 17.

[12]Glenn R. Winters, "The Merit Plan for Judicial Selection and Tenure—Its Historical Development," in Winters, Judicial Selection and Tenure, op. cit., p. 34.

[13]Ibid.

[14]Ibid., p. 35.

[15]Ibid.

[16]For an analysis of the impact of bar polls on the outcomes of merit retention elections, see John M. Scheb, "The Bar Poll and Merit Retention: An Analysis of Florida's Experiences in 1978 and 1980." Unpublished.

[17]Winters, "The Merit Plan for Judicial Selection and Tenure," op. cit., p. 36.

[18]Ibid., p. 37.

[19]Watson, op. cit., p. 59.

[20]Berkson, op. cit., p. 178.

[21]Robert L. Anderson and George J. Miller, "Law and the Courts," in Manning J. Dauer (ed.), Florida's Politics and Government (Gainesville: The University of Florida Presses, 1980), p. 159.

[22]Florida Constitution (Tallahassee: Office of the Secretary of State, 1980), Article V, subsection 4(b).

[23]Anderson and Miller, op. cit., p. 168.

[24]For commentary on and exhaustive documentation of these disparate traditions in the advocacy of various selection methods, see Craig Ducat and Victor E. Flango, "In Search of Qualified Judges: An Inquiry into the Relevance of Judicial Selection Research," a paper prepared for the 1975 Annual Meeting of the American Political Science Association.

[25]Jack Peltason, "Merits and Demerits of the Missouri Court Plan," in Glenn Winters (ed.), Judicial Selection and Tenure, op. cit., p. 95.

[26]Ibid., p. 96.

[27]Ibid., p. 98.

[28]Barry Golomb, "Selection of the Judiciary: For Election," in Glenn R. Winters (ed.), Judicial Selection and Tenure, op. cit., p. 95.

[29]In deference to the wishes of the judges we interviewed, their names are omitted from the record.

CHAPTER IV
JUDICIAL SELECTION RESEARCH IN POLITICAL SCIENCE

Although the corpus of literature dealing with judicial selection is immense, most of it is purely polemical in nature and appears in law reviews and journals of advocacy.[1] Actually, the body of empirical literature appearing in the political science journals is small and sketchy.

The most significant empirical issue to which political scientists interested in judicial selection have addressed themselves is: Does it make any difference which mode of judicial selection is employed? The kinds of potential differences that have been studied include the backgrounds of selected judges,[2] the actual decisional behavior of selected judges,[3] and, increasingly, the group or groups controlling the selection process.[4] Less relevant to our concerns here are the studies of voter behavior in various types of judicial elections.[5]

There are some obvious methodological pitfalls to be encountered by the researcher seeking to compare the effects of one selection system against others. Perhaps most obvious is the difficulty arising from the complexity of operative selection systems. There are five unique methods of judicial selection currently operating in the American states:

gubernatorial appointment, legislative appointment, partisan election, non-partisan election and merit selection. Very often, several of these will operate simultaneously within one state, usually for different levels of courts. Florida is an example of a state employing merit selection and retention for all appellate judges while employing non-partisan elections for trial judges (with interim trial court vacancies filled by merit selection).[6] Additionally, since state legislatures are given to changing selection systems, researchers must determine exactly which method of selection is associated with each judge in the study. Some past comparative research is tainted by the fact that the researchers did not separate truly elected judges from ad interim appointments in a state ostensibly employing judicial elections.[7]

Another crucial problem is that actual selection practices may deviate appreciably from the legally prescribed mode of selection. Canon has illustrated this phenomenon using the state of Michigan as an example:

> In Michigan, the justices are elected on a non-partisan ballot. However, only on receipt of a party convention's nomination can a candidate normally be listed on this ballot. Moreover, my Michigan acquaintances tell me, the "non-partisan" campaign carries strong partisan overtones.[8]

Researchers conducting rather superficial investigations involving only correlation of measurable variables must guard against dangers of misclassification of selection

systems. Such oversights are bound to impair the credibility of research conclusions.

Another common pitfall is the tendency to fall victim to spurious relationships. This problem is particularly acute when comparing judicial characteristics across states employing different selection systems. One must be sure that systematic differences which appear are, in fact, due to differences in selection per se and not to other less obvious differences in political culture.

With these caveats in mind, let us begin to review the empirical findings of political scientists who have studied judicial selection systems. We shall commence with those studies that have focused on judicial backgrounds and their relationship to mode of selection.

In assessing the effect of mode of selection on the social background characteristics of the judiciary, researchers assume that a judge's background, i.e. his socioeconomic origin, race, religion, party affiliation, geographical origin and education are variables deserving empirical study. Granted that proponents and opponents of merit selection have at times made claims about the selectioanl biases inherent in the various selection methods,[9] but there is little evidence that background variables, as enumerated above, have any appreciable impact on judicial decision-making behavior.[10] Still, it is perhaps politically relevant to know what kind of individuals are favored by the various selection systems.

In comparing the trial court judges in twelve states, Herbert Jacob concludes that "judicial selection procedures recruit judges with some different background characteristics."[11] Specifically, Jacob found that partisan elections and merit systems are apt to recruit "locals" while other modes of selection recruit "cosmopolitan" judges.[12] Jacob also found that gubernatorially and legislatively appointed judges are likely to have had legislative experience while elected and merit selected judges are more prone to have had enforcement experience.[13] Furthermore, Jacob found that gubernatorially and legislatively appointed judges possess more formal education than judges selected by the other methods.[14]

In his widely cited replication of Jacob's study, Bradley Canon argued that most of the variation in backgrounds that Jacob attributed to mode of selection disappears when region, or "political culture," is accounted for.[15] Nevertheless, in a recent edition of Justice in America, Jacob persists in asserting that "each procedure gives access to different groups and establishes different sets of informal qualifications. Each results in somewhat different types of individuals being chosen for the bench."[16]

Table II shows a comparison of typical background variables for merit selected, elected and appointed judges currently serving on Florida's District Courts of Appeal. As can be readily seen, the data show no appreciable background differences due to mode of selection. The marginally greater

Table II

Selected Background Characteristics of Judges on Florida District Courts of Appeal, by Mode of Selection

Background variables:	Mode of Selection		
	Appointed (n = 5)	Elected* (n = 8)	Merit Plan (n = 26)
1) Geographical origin:			
Florida	3	3	16
Other	2	5	10
Rural	2	6	7
Urban	3	2	19
2) Sex			
Male	5	8	23
Female	0	0	3
3) Race			
White	5	8	25
Black	0	0	1
4) Prior Experience			
Private practice	3	4	13
Other courts	2	2	13
Legislature	0	1	0
Public defender	0	1	0
5) Legal Education			
University of Florida	3	5	16
Other Florida schools	2	1	2
Ivy League schools	0	0	3
Miscellaneous	0	2	5

*Includes both partisan and non-partisan elected judges.

tendency for merit selected judges to have attended non-Florida law schools is probably a function of demographic change rather than change in selection mode.

The most interesting differences shown in Table II are in the sex and race categories. Many judges agreed with our speculation that these four judges (one black male and three white females) would never have been selected in contested elections. Some, however, pointed out that, if judicial elections were still operating, there would be occasion for interim gubernatorial appointment. They were confident that the current Florida governor, Bob Graham, would, under such circumstances, attempt to recruit qualified blacks and women for appellate positions. Given the plausibility of this hypothesis, we think it inappropriate to credit the merit selection plan per se with the recruitment of judges other than white males.

We find, then, no compelling evidence to undermine the conventional wisdom that judicial selection structures are unrelated to differences in judicial backgrounds. Yet we must admit that our findings are rather sketchy: we do not present data on the full range of background variables which have appeared in the literature. But, as Ducat and Flango point out, there seems to be little hope for the utility of the judicial selection variable as an explanation for variation in judicial backgrounds.[17]

Let us turn now to the literature which relates judicial selection to judicial decision-making directly. The

literature here is quite sparse, primarily due to the methodological difficulties involved. There are four possible operational approaches to measuring decision-making; each has its own advantages and drawbacks.

One approach is to focus on sentencing severity in trial courts. Gibson has used this method in his study of the effect of political attitudes and role perceptions on behavior.[18] The use of sentencing severity is attractive due to the interval level nature of the data: years. Yet some may claim that this aspect of judicial decision-making is trivial in contrast to the substantive policy-making behavior of the appellate courts. As yet we are aware of no study relating mode of selection to variance in sentencing severity.

A second approach is to examine dissent rates. In his study of Louisiana judges, Kenneth M. Vines hypothesized that, given the imperatives of re-election, elected judges would be less apt to dissent than would appointed judges.[19] In direct contrast to Vines' suggestion, Canon and Jaros expected a higher dissent rate among elected judges because "elected judges may feel a direct and more exclusive sense of popular constituency than appointed ones."[20] Upon data analysis, Canon and Jaros found that indeed, elected judges were more prone to dissent than appointed judges. Interestingly, so were merit selected judges! Yet Canon and Jaros found that this relationship diminished considerably when intervening variables were taken into account.[21]

Another approach involves the comparison of reversal rates for judges of different selection modes. In a completely rationalized system, one would expect that reversal rates would be extremely low. If judicial decisions were made automatically based on clear rules of law, then there would be little need for reversal by higher courts. Hence, if merit selection is but one aspect of legal rationalization, the merit selected judges should enjoy lower reversal rates than their colleagues selected by more traditional means. However, we suspect that such an effect would emerge only after merit selection had been in existence for some time at all levels of courts. In that case, comparison of reversal rates would have to be on a cross-state basis. This avenue of research cannot be pursued until we have had much more experience with merit selection.

Perhaps the most sophisticated and credible approach is that taken by Atkins and Glick in their study of judicial recruitment and state supreme court decisions.[22] These researchers compared mean support for appellants in five substantive categories in all fifty states and found that mode of selection did not significantly explain variation in these means.

By the authors' own admission, the Atkins and Glick study has several limitations.[23] Most obvious is the failure to distinguish between ostensible and actual selection procedures. The problem stems from the fact that, for

the sake of methodological convenience, Atkins and Glick use states as units of analysis, labelling each by the selection mode ostensibly employed for the supreme court. The problem is that a state officially employing partisan election might in practice be appointive, given a sufficient number of interim gubernatorial appointments. This deviation from formal selection procedure might very well have affected the conclusions that Atkins and Glick drew from their analysis.

Another limitation is the separation of partisan and non-partisan election in the analysis. "Clearly, the available data shown suggest that the selection process and politics associated with each kind of election are surprisingly similar."[24] Again we are faced with a situation in which methodology perhaps biases outcome.

To eliminate these sources of bias as well as the threat to validity stemming from variation in political culture, a comparison of judicial selection modes should use the individual as the unit of analysis, drawing the research population from one state in which several selection procedures are in use for one level of the judiciary. As we noted in Chapter II, Florida has recently changed to the Missouri Plan for its appellate courts. Currently, there are judges serving on the District Courts of Appeal, the intermediate appellate courts, who were recruited through gubernatorial appointment, non-partisan election

and the merit plan.[25] Table III provides data on modes of initial selection for judges on these courts as of January 1981. This fact makes the Florida District Courts a good laboratory in which to conduct comparative judicial selection research.

The obvious conclusion from the studies we have cited is that judicial selection is not very useful in explaining court output. Yet the number of credible studies in this realm is very small. There is, in our opinion, room for more comparative and replicative research.

A very different tradition of research into judicial selection is concerned with the empirical issues raised by those who favor the elective process and those who are opposed to merit selection because it is undemocratic. Researchers in this tradition focus on voter behavior in judicial elections (including merit retention elections) and on turnover of judicial personnel under different recruitment schemes.

Perhaps most notable of this research tradition is the work of Phillip Dubois.[26] Dubois is primarily concerned with whether judicial elections are effective mechanisms of popular control over the courts. Dubois studied mean turnout and mean roll-off in state judicial elections from 1948 to 1974.[27] He concluded that turnout and consistency of voter choice are both promoted by partisan elections. Given that party identification of judges has been linked to judicial behavior through case studies, Dubois expresses hope

Table III

Mode of Initial Selection of Judges on Florida District Courts of Appeal, 1981

	Judge	Selection Mode	Year Selected
1.	Tillman Pearson	appointed by governor	1957
2.	Thomas H. Barkdull	"	1961
3.	Norman Hendry	"	1961
4.	Woodie Liles	"	1965
5.	Frank Hobson	"	1965
6.	William Owen	"	1967
7.	Edward F. Boardman	non-partisan election	1972
8.	E. R. Mills, Jr.	"	1974
9.	T. Truett Ott	"	1976
10.	James C. Dauksch	"	1976
11.	Richard W. Ervin, III	"	1976
12.	Phillip A. Hubbart	"	1976
13.	Harry L. Anstead	"	1976
14.	Gavin K. Letts	"	1976
15.	Stephen H. Grimes	merit selected	1973
16.	James C. Downey	"	1973
17.	Guyte P. McCord	"	1973
18.	John M. Scheb	"	1974
19.	Robert P. Smith, Jr.	"	1975
20.	Paul W. Danahy	"	1977
21.	John H. Moore, II	"	1977
22.	Herboth S. Ryder	"	1977
23.	John R. Beranek	"	1978
24.	Alan R. Schwartz	"	1978
25.	Anne Cawthon Booth	"	1978
26.	Melvin Orfinger	"	1979
27.	Leander J. Shaw, Jr.	"	1979
28.	Hugh H. Glickstein	"	1979
29.	Warren H. Cobb	"	1979
30.	Winifred L. Wentworth	"	1979
31.	Monterey Campbell	"	1979
32.	Daniel T. K. Hurley	"	1979
33.	Doublass B. Shivers	"	1979
34.	Winifred J. Sharp	"	1979
35.	Larry G. Smith	"	1979
36.	George W. Hersey	"	1979
37.	Joseph Nesbitt	"	1979
38.	Ford Thompson	"	1980
39.	Frank D. Upchurch, Jr.	"	1980
40.	Daniel Pearson	"	1980
41.	Natalie Baskin	"	1980
42.	Joe A. Cowart	"	1980
43.	James Joanos	"	1980

that party identification can serve as the mechanism through which the voters retain control over judicial output.[28] Obviously, Dubois is committed a priori to judicial elections; he avoids the issues of quality and competence raised by proponents of merit selection. To those committed to an independent judiciary, Dubois' research findings are excellent arguments for merit selection and retention.

Although they can hardly be classified as opponents of merit selection and retention, Susan Carbon and Larry Berkson have conducted research into voter behavior and judicial turnover in retention elections.[29] Their main objective is to explain why so few judges are ousted by the voters in merit retention elections. They find that judges are occasionally opposed on the basis of controversial decisions, scandals, criminal charges and temperament. Yet to date less than two percent of incumbent judges have failed to secure retention by the voters.[30] In a closing note, Carbon and Berkson argue that this situation is exactly what the designers of merit retention had in mind; they wanted a system under which judges would be unworried about catering to public pressures.[31] In this view, ouster under merit retention is similar in purpose to impeachment, occurring after flagrant malfeasance.

To date, Florida has held two retention elections: one in 1978 and one in 1980. The outcomes of these elections make sense in light of the Carbon and Berkson findings. No

Florida judge has failed to secure retention. In most cases, the margin of retention was substantial if not overwhelming. However, in one case in the 1980 election, a Supreme Court justice nearly lost his tenure.[32] Interestingly, this justice had been involved in something of a scandal although no criminal charges or other formal sanctions were initiated.

After their excellent review of judicial selection literature circa 1975, Ducat and Flango expressed pessimism about the future of research that models judicial selection mode as an independent variable.[33] We must belatedly concur with their evaluation: no significant research endeavor since their assessment has demonstrated that their pessimism was unfounded.

Ducat and Flango call for a new research angle—investigation of judicial selection as "one of a number of dependent variables."[34] They point the way by comparing socio-economic characteristics of states adopting the same mode of judicial selection. On the basis of data from all fifty states, Ducat and Flango conclude that

> Legislative election, and to a lesser extent partisan election and gubernatorial appointment, occur in highly industrialized states, while non-partisan election and merit selection are found in non-manufacturing, more agricultural and less urbanized states. . . . It is interesting to note, too, that states that use partisan election have the lowest ratio of lawyers per 100,000 population.[35]

The direction that Ducat and Flango indicate appears to be a promising one. Perhaps if merit selection were viewed as but one of many components of judicial modernization, as we have earlier suggested, we might find interesting correlations between degree of modernization and socio-economic and structural variables. In structural terms, there may be a relationship between whether a state bar association is integrated and modernization.[36] This could be refined by employing the temporal dimension: when was the bar integrated? It seems that there is much room for imagination in examining mode of selection as a dependent variable, yet we will not undertake such empirical research in this dissertation. That prospect is still on the research agenda.

If this is an unusually short review of literature in a political science dissertation, it is because the literature based on empirical research into judicial selection is extremely sparse.

Perhaps the major criticism that is made against judicial behavior research generally is that it is often atheoretical. Judicial behavioralists are particularly notorious for generating plenty of statistical relationships that bear no consequences for theory. Certainly this criticism can be applied to much of the judicial selection research in political science. Let us then, before advancing a new hypothesis about the effect of judicial selection

modes, explore the social science literature on role theory which has strong relevance to the administration of justice in modern society.

Notes

[1]An excellent bibliography of judicial selection is Nancy Chinn and Larry C. Berkson, Literature on Judicial Selection (Chicago: American Judicature Society, 1980).

[2]Herbert Jacob, "The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges," 13 Journal of Public Law 104 (1964); Bradley C. Canon, "The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered," 6 Law and Society Review 579 (1972); Berg, Green, Schmidhauser and Schneider, "The Consequences of Judicial Reform: A Comparative Analysis of the California and Iowa Appellate Systems," 28 Western Political Quarterly 263 (1975).

[3]Burton M. Atkins and Henry R. Glick, "Formal Judicial Recruitment and State Supreme Court Decisions," 2 American Politics Quarterly 427 (1974); Stuart Nagel, "Comparing Elected and Appointed Judicial Systems," (Sage Professional in American Politics, Series No. 04-001, 1973).

[4]Joel B. Grossman, Lawyers and Judges: The A.B.A. and the Politics of Judicial Selection (New York: John Wiley, 1965); Herbert Jacob, Justice in America: Courts, Lawyers and the Judicial Process (Boston: Little, Brown, and Company, 1978). See, in particular, pp. 59-63; Dietrich Reuschmeyer, Lawyers and Their Society (Cambridge: Harvard University Press, 1973); John Schmidhauser, Judges and Justices: The Federal Appellate Judiciary (Boston: Little, Brown, and Company, 1979); See, in particular, chs. Richard Watson and Rondal G. Downing, The Politics of the Bench and Bar: Judicial Selection Under the Missouri Non-partisan Court Plan (New York: John Wiley and Sons, 1969).

[5]Burton Atkins, "Judicial Elections—What the Evidence Shows," 50 Florida Bar Journal 152 (1976); Susan Carbon and Larry C. Berkson, Judicial Retention Elections in the United States (Chicago: American Judicature Society, 1980); Phillip DuBois, "Judicial Elections and Judicial Policy: The Case for the Partisan Election of Judges," paper presented at the 1977 Annual Meeting of the American Political Science Association.

[6]Our interviews indicate that Florida trial judges are generally skeptical of merit retention, mainly due to a perception that merit retention enhances the power of the press to control outcomes in judicial elections. We must note, however, that such a perception is empirically undocumented.

[7]This methodological problem is discussed in Craig Ducat and Victor E. Flango, "In Search of Qualified Judges: An Inquiry into the Relevance of Judicial Selection Research," a paper presented at the 1975 Annual Meeting of the American Political Science Association.

[8]Canon, op. cit., p. 591.

[9]Malcolm R. Wilkey, "Judicial Background and Decision-Making," in Glenn R. Winters (ed.), Judicial Selection and Tenure (Chicago: American Judicature Society, 1973); pp. 178-180.

[10]Stuart Nagel, "Political Party Affiliation and Judges' Decisions," 55 American Political Science Review 844 (1961). Nagel finds that party identification explains some variation in decision-making. Ducat and Flango, op. cit., conclude after a thorough review of literature circa 1975 that other background variables are of little use as explanatory variables. We are aware of no research since 1975 that violates the Ducat and Flango expectation.

[11]Jacob, op. cit., p. 113.

[12]Ibid., p. 108.

[13]Ibid., p. 110.

[14]Ibid., p. 108.

[15]Canon, op. cit., p. 588.

[16]Herbert Jacob, Justice in America: Courts, Lawyers and the Judicial Process (Boston: Little, Brown and Co.), p. 103.

[17]Ducat and Flango, op. cit., p. 29.

[18]James Gibson, "Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model," 72 American Political Science Review 912 (1979).

[19]Kenneth M. Vines, "Political Functions of a State Supreme Court," in Vines and Jacob (eds.), Tulane Studies in Political Science: Studies in Judicial Politics (New Orleans: Tulane University Press, 1962).

[20]Bradley C. Canon and Dean Jaros, "External Variables, Institutional Structure and Dissent on State Supreme Courts," 3 Polity 183 (1970), p. 183

[21]Ibid.

[22]Atkins and Glick, op. cit.

[23]Ibid., pp. 445-446.

[24]Ibid., p. 447.

[25]Of the entire population of active judges (n = 43), 29 were selected by merit plan, 8 were elected on non-partisan ballot and 6 were appointed by governors.

[26]Dubois, op. cit.

[27]Ibid., p. 13.

[28]Ibid., p. 47.

[29]Carbon and Berkson, op. cit.

[30]Ibid., pp. 21-40.

[31]Ibid., p. 24.

[32]Joe Boyd, retained by 57% of the electorate.

[33]Ducat and Flango, op. cit., p. 30.

[34]Ibid., p. 31.

[35]Ibid., pp. 26-27.

[36]"Integration" in this context refers to legally prescribed membership in the state bar association for all practicing attorneys.

CHAPTER V
MERIT SELECTION, THE JUDICIAL ROLE AND COURT MODERNIZATION

Before probing the nexus suggested by the title of this chapter, let us define what we mean by "judicial role" and explore its analytic utility in the study of the judicial process generally. Deustch and Krauss argue that there are three distinct usages of the term "role in social science literature:

> 1. The role consists of the system of expectations which may exist in the social world surrounding the occupant of a position—expectations regarding his behavior toward occupants of some other position. This may be termed the prescribed role.
>
> 2. The role consists of those specific expectations that an occupant of a position perceives as applicable to his own behavior when he interacts with occupants of some other position. This may be termed the subjective role.
>
> 3. The role consists of the specific overt behavior of the occupant of a position as he interacts with occupants of some other position. This may be termed the enacted role.

As it relates to the judicial role, the "prescribed role" can be found in the general societal expectations of judges as elicited through interviews with members of the judiciary's attentive public. The "enacted role" can be found in the actual behavior of judges, i.e. inferred from

the content of judicial opinions. We opt for neither of these approaches. The first is simply not germane to our theoretical concerns; the second is methodologically too involved for our limited resources. Thus we opt for the "subjective role" as determined by questionnaire. This aspect of the judicial role is both theoretically and methodologically well suited to our purposes and resources.

We recognize that role orientations are the products of interactions with other relevant factors; that there is a set, perhaps a system, of role expectations surrounding the occupant of any social position; and that role orientations which can be generalized from observation are best conceived of as inter-subjective orientations.

We utilize role analysis because of its ability to link the structural and behavioral concerns in our study of judicial selection. Specifically, we are interested in how changes in judicial selection structures affect the role orientations of judges on Florida's appellate courts. A short review of the literature on judicial decision-making will illustrate the utility of role analysis in the explanation of judicial behavior.

Role theory first entered the study of courts as a means for improving the predictability of judicial decisions. Rejecting the notion that decisions could be adequately explained in terms of legal elements, political scientists began to look to extra-legal factors. Glendon Schubert, the pioneering judicial behavioralist, proposed simple behavioral

models employing political attitudes as explanations of decisions.[2] At the outset, Schubert used the much criticized "scalogram" approach and later moved into more sophisticated multi-dimensional procedures. In these efforts to explain behavior Schubert was only moderately successful.[3]

One of Schubert's most vocal critics, Theodore Becker, proposed the inclusion of the judicial role variable in analyses of behavior. In his seminal work on the theory and methodology of judicial behavior research, Political Behavioralism and Modern Jurisprudence,[4] Becker posited the judicial role as an intervening variable. According to Becker's conceptualization, the judicial role mediates between political attitudes and case opinions allowing certain values to influence decision-making in certain instances.[5]

Perhaps the best-known illustration of the intervening effect of the role variable is the case of Mr. Justice Felix Frankfurter.[6] The civil liberties scales constructed by Schubert and Spaeth through analysis of Supreme Court opinions resulted in the classification of Frankfurter as unsympathetic to libertarian interests. Reacting to this "suspect classification," Joel Grossman argued that Frankfurter was anything but unsympathetic to civil liberties.[7] Rather, argued Grossman, Frankfurter's consistently "poor" record in such cases was a function of his conception of the judicial role in general, and of the Supreme Court specifically.[8] Frankfurter harbored a narrow, traditional role orientation

that eschewed judicial activism and emphasized judicial restraint. This role orientation was termed by Grossman "the denial of judicial responsibility."[9] Consequently, if we can believe Grossman's analysis, Frankfurter's libertarian sympathies were held in abeyance by his judicial philosophy.

In a similar vein to Grossman's study stands a piece by Dorothy B. James.[10] James considered judicial role statements, both on and off the bench, by Justices Douglas and Jackson. In this non-quantitative analysis, James butresses Grossman's conclusion that role orientations play an important role in determining decisional outcomes.

Despite general agreement among judicial scholars as to the importance of the role orientation as a determinant of behavior, no one had, until recently, been successful in developing an empirical model which systematically relates role orientations to decisional variation. In a study published in 1977, J. Woodford Howard explored "the relationships among judicial role perceptions and voting behavior in three leading intermediate tribunals—United States Courts of Appeals for the Second, Fifth and District of Columbia Circuits against a backdrop of the political orientations of their members . . ."[11] Howard elaborates:

> The data concerning political values and role perceptions are derived from off-the-record interviews conducted by the author with 35 active and senior circuit judges of the three tribunals during 1969-71. The voting data are derived from analysis of all decisions by

> the three tribunals after hearing or submission during FY 1965-67 (N=4,941), roughly 40% of total cases so decided by U.S. circuit courts in this period. Thirty judges, slightly less than a third of total federal circuit judges, participated in both the interviews and the decision . . . [12]

After analysis of cross-classification tables, Howard concludes that "different role perceptions, though untested in exclusively lawmaking situations, were moderately associated with liberal-conservative voting behavior . . ." Howard further observes that "judicial role perceptions in the three courts appear neither so weak as to be subsumed under personal preferences nor so strong as to be considered the most significant single factor in the whole decisional process."[13]

A more impressive empirical study of judicial role orientations and behavior was conducted by James Gibson and reported in the American Political Science Review in 1978.[14] Gibson sought to explain variation in sentencing severity on Iowa trial courts in terms of political attitudes measured on an ordinal scale of liberalism-conservatism. In doing this, Gibson found the bivariate Pearson correlation to be "less than spectacular."[15] However, when he introduced an intervening role orientation variable into the model (measured ordinally according to "degree of attitudinal influence allowed"),[16] the level of explained variance rose dramatically. Using the multiple regression technique, Gibson reported that the interactive role-attitude model generated an R^2 of .64,

i.e. 64% of the variance in sentencing severity was "explained" by way of an interaction between role orientations and political attitudes.[17] Gibson concluded that "role orientations do not predict the policy content of behavior; rather they predict the criteria of decision-making."[18] Gibson speculated that "role orientations may provide an appropriate vehicle for analyzing inter-institutional differences in decision-making in a more systematic fashion. Differences among institutions in the predictability of behavior from various decisional criteria may be a function of differences in the contextual constraints imposed on decisions through role expectations . . ."[19] Though Gibson has in mind a comparative study of, for example, courts and legislatures, it is our position that role analysis can be useful in comparing decisional styles in different judicial institutions. Thus role analysis might prove useful in comparing and contrasting trial and appellate courts, American and German courts, federal and state courts, etc. Might this same analytic tool prove efficacious in the comparative study of merit selected and elected courts?

Given the utility of the judicial role as an instrument for explaining court output, we feel that we are on solid empirical and theoretical ground in relating changes in judicial selection structures to variation in role orientations. Following the lead taken by Wahlke, et al. in their study of the legislative system, we find role analysis a useful device for tying together the structural and behavioral

study of the legislative system, we find role analysis a useful device for tying together the structural and behavioral concerns of political science.[20]

Before we consider just how changes in judicial selection structure are theoretically related to judicial role orientations, let us explore the nature of the judicial role as it has been delineated by political science. This undertaking is problematic, however, not because of the paucity of research done, but due to the confusion that has been generated from the appearance of many studies, each with its own unique terminology.

Probably the best known of the judicial role research is the work of Henry R. Glick and Kenneth Vines.[21] Vines supervised Glick's dissertation research at Tulane, research which led to the publication of many articles by both of these political scientists, one jointly, the rest separately. Unfortunately, each of these articles dealing with the nature and distribution of role orientations employs unique labels for the several orientations delineated. This regrettable fact makes a review of this literature more laborious and, more importantly, more confusing. To help alleviate this confusion, we have tried to sort out the vocabulary of Glick, Vines and the other writers we will discuss in this context. Table IV presents the vocabulary of the judicial role and attributes labels to their respective authors. The reader will notice that there is considerable overlap among the writers. Yet there is enough

Table IV

The Vocabulary of Judicial Role Orientations

Purposive Role Sector		Decisional Role Sector	
Law Interpreter	G, GV, UB	Law Interpreter	V, GV, UB, W
Law Maker	G, GV, UB	Law Maker	V, GV, UB, W
Adjudicator	G, V, UB	Eclectic	W
Administrator	G, V, UB	Formalist	G
Peacekeeper	UB	Realist	G
Task Performer	G	Pragmatist	V, GV
Policy Maker	V	Trial Judge	UB
Ritualist	V	Mechanist	G
Pragmatist	G	Peacekeeper	UB
Constitutional Defender	G		
Trial Judge	UB		

Key: UB: Ungs and Baas, footnote 64.
G: Glick, footnote 21.
V: Vines, footnote 21.
GV: Glick and Vines, footnote 21.
W: Wold, footnote 59.

uniqueness to make matters difficult. We suspect that this uniqueness is not entirely related to unique aspects of objective reality—that much springs from the penchant of political scientists to invent new terms for old concepts.

Glick and Vines developed their typologies of the judicial role based on interviews that Glick conducted with twenty-six state supreme court justices in New Jersey, Pennsylvania, Louisiana and Massachusetts.[22] At the time this research was conducted (1967), it was somewhat novel for a political scientist to study judicial roles and behavior in the field. As Glick notes in his dissertation, researchers "have been reluctant to approach judges because they believed the judiciary was removed from direct scrutiny by an impenetrable 'purple curtain.' The image which judges often convey and the myths developed concerning the sanctum sanctorum [sic!] have made the risks of such research seem much too high."[23] Despite the "myth of the purple curtain" and the "cult of the robe," Glick was able to obtain a 93% level of cooperation from the judges he contacted for interviews.[24]

In gathering data from which the typologies were to be constructed, Glick employed open-ended questions which allowed the judges to describe their roles themselves with a minimum of constraint.[25] This is the same procedure followed by Wahlke et al. in their study of legislative roles.[26] This approach has been criticized by Baas as infusing researcher subjectivity into the analysis through coding

responses and collapsing categories in typological construction.[27] Although this is a valid criticism, the solution that Baas proposes does not eliminate researcher subjectivity, as we shall see. The crucial question then is: How much subjectivity? Regrettably, this query is impossible to answer.

Again, following Wahlke et al.,[28] Glick divides the analysis into various role sectors. "Purposive," "consensual" and "decision-making" expectations of judges are explored by Glick at some length.[29] Purposive expectations refer to the set of objectives that judges pursue qua judges. Glick elaborates:

> Legal requirements set formal boundaries on the functions that state supreme courts can perform. Within general limitations regarding such things as jurisdiction, however, judges themselves have great latitude in defining their own objectives. The way judges perceive their purpose is important. Perceptions may influence the behavior of individual judges and the combined perceptions of judges on a particular court may shape the way the court interacts with other units in the state political system.[30]

In order to get at the purposive expectations of judges, Glick asked "First, how would you describe the job of a supreme court judge?"[31] From the responses to this question, Glick inferred six basic orientations: "(1) the adjudicator; (2) the administrator; (3) the law-maker; (4) the constitutional defender; (5) the affective; and (6) the work performer."[32]

The "adjudicator" is oriented toward the "formalistic task of deciding cases."[33] This type downplays the potential policy-making role of the courts in favor of a narrow role orientation. The "administrator" perceives the state supreme court's role as providing the "proper guidance for the trial courts and for counsel and keep them in line with federal determinations."[34] Here, too, we see a rather narrow view of the court's function—one which clearly eschews a policy-making role. The "law-maker" willingly embraces this policy-making role. "Law-makers have no doubts that the court makes law through its decisions."[35] One purposive orientation not anticipated by Glick was the "constitutional defender." This type is primarily concerned with protecting the constitution(s) against those who would destroy it or them.[36] The "affective" types are "those who describe their job in terms of their own feelings or emotions."[37] The "work-performers" stress the perfunctory aspects of judging: doing research, preparing memos, attending conferences, etc.[38]

In a later publication, Vines refines Glick's purposive typology and reduces it to four role types.[39] We should bear in mind that Vines is working here with the same data Glick gathered for his dissertation. Vines labels the four purposive types the "ritualist," the "adjudicator," the "administrator" and the "policy-maker."[40]

Vines' "ritualist" resembles Glick's "work performer." This type refers to the "structured routine of the judicial

process" and stress the "complexities of settling cases."[41] Vines elaborates:

> It would seem, therefore, that the ritualist orientation toward the judicial process provided convenient opportunities for judges who wished to avoid commitment to policy involvement or preoccupation with the problems of the political system.[42]

Vines' "adjudicator" is oriented toward the immediate concern of dispute resolution but does not define the dispute in terms larger than those instant to the litigation at hand. Like the "ritualist," the "adjudicator" downplays the policy-making role of the judicial branch.

> One judge stated simply: "You're an arbiter. You decide cases." Others emphasized certain elements of adjudication such as specific functions or procedures in disposing of litigation . . .[43]

As in Glick's typology, Vines' "administrator" is concerned primarily with "the development of law or of the activities of the lower courts."[44] Quoting one of Glick's sources, Vines characterized the administrator as a supervisor: "The court prepares the rules for the internal administration for all the courts in the state and prepares the rules of practice and procedure. It's in charge of the bar and the practice of law."[45]

Vines' "policy-maker" corresponds to Glick's "lawmaker." This type harbors the broadest view of the purpose of the court. As another of Glick's respondents noted, the

judicial role is "more than just following precedent. It's what you think is just and the right thing to do."[46]

In terms of the consensual sector of the judicial role, we are here confronted with the kind of norms and habits that judges share—that separate judging from other forms of human endeavor. As Glick notes, "there are five kinds of attributes and behavior which judges perceive as important consensual norms: (1) personality attributes; (2) work habits; (3) decision-making attributes; (4) proper personal conduct; and (5) scholarship attributes."[47] Most political scientists are interested more in the study of conflict than concensus. This seems to be the case, in any event, with students of judicial behavior. Hence, it is not surprising that the consensual sector of the judicial role has not been studied or reported on with great frequency. Given that their main task has been to explain variation in decision-making, judicial behavioralists have been more oriented toward those sectors of the judicial role in which there is great variance: the purposive and the decisional sectors. Clearly, the one receiving the most attention has been the decision-making sector.

Glick reports four basic decision-making orientations among the supreme court judges he interviewed: the "mechanist," the "formalist," the "realist," and the "equity" oriented type.[43] Let us consider briefly the nature of each of these.

The "mechanist" is related to the long-standing and amazingly resilient "myth of mechanical jurisprudence."[49] This myth, which has been discredited by legal realism and by political behavioralism, holds that the judge is an inconsequential aspect of the process of case decision—that "judicial power, as contradistinguished from the power of the law, has no existence. Courts are the mere instruments of the law and can will nothing."[50] This conception of the judicial role in decision-making has been disparagingly referred to as "slot machine jurisprudence."[51] The notion is that a particular case is fed into the legal machinery and out comes a decision which is clearly, inexorably determined by positive legal criteria. Even though, as we have noted, this is a thoroughly discredited notion, Glick found supreme court judges in Louisiana who espoused this role orientation.[52] For our purposes in relating role orientations to legal rationalization, we should note that Louisiana is a "Roman Law state." Its legal system is profoundly influenced by the Napoleonic code.

Glick's "formalist" perceives "decision-making to be composed of a series of stages starting with the presentation of oral arguments, proceeding to the formulation of and ending with the writing of opinions.[53] Like the "mechanist," the "formalist" plays down the role of extra-legal factors which might find their way into the decisional process.

The "realist" is "aware that legal sources alone do not impel judges toward an inevitable answer in a case. Judges alone decide litigation based on a wide variety of factors in addition to the dictates of sacrosanct legal principles."[54]

Similar to the "realist," Glick's "equity" oriented judge recognizes that "legal doctrines or precedents are not sufficient determinants of decisions." But the "equity" type goes further in stressing the importance of achieving substantive justice in the case at hand. As Glick readily admits, the difference may be a slight one.[56]

In a later article co-authored by Glick and Vines, the authors refine and condense Glick's decisional typology.[57] We are presented with a new set of terms: the "law-interpreter," the "law-maker," and the "pragmatist."[58] This framework is clearly simpler, more intuitively sensible and more parsimonious. As Table IV indicates, this typology has been essentially adopted by Wold in his study of judicial role orientations in Delaware, New York, Virginia and Maryland.[59] Let us briefly consider each of the types in Glick and Vines' condensed decision-making typology.

The "law-interpreter," which subsumes Glick's "mechanist" and "formalist" orientations, is oriented strictly towards legal criteria in the making of judicial decisions. Precedent and rules of law are sufficient to the task of making decisions; the process is essentially mechanistic. The task of interpretation of legislative edict is viewed as non-problematic as long as judges adhere to "strict construction."[60]

The "law-maker," correlated with Vines' purposive "policy-maker," is conscious of the extra-legal factors that attend judicial decision-making. Since "no matter how you decide a case, you're making law,"[61] the "law-maker" uses his judicial position to advance his particular notions of right and justice. Thus he embraces the tradition of judicial activism and broad constructionism.

The "pragmatist" is, like the "adjudicator" in the purposive sector, willing to compromise on the issues of activism/restraint and law making/law interpreting. Thus "pragmatists" tend to be both eclectic and adaptive in their decisional orientations.[62]

As we have already noted, Glick and Vines employed an open-ended question technique. Despite its obvious advantages, the open-ended approach carries with it problems of sensitivity and precision. It may not tap the range of existing role types and it may not lead to precise specification of the role types that are discovered.[63]

These methodological problems led Ungs and Baas to employ a more comprehensive and precise method for building empirical typologies of the judicial role.[64] Unfortunately, their study has not, until now, been replicated.

To construct their survey instrument, Ungs and Baas examined the literature in which judges express their views of the judicial role: case opinions, legal briefs, essays, etc. From this body of literature, a set of approximately

500 statements was drawn to reflect a four-part typology of the judicial role based on the Glick and Vines typologies.[65] Although they purport to be studying the proposive role sector, it is clear that the Ungs and Baas typology encompasses the decisional sector as well.[66] Let us consider the typology that Ungs and Baas proposed to test empirically.

The first type they labelled the "law interpreter." This type subsumes Glick and Vines' "ritualist" and "law-interpreter" categories. Ungs and Baas also proposed the "adjudicator," the "administrator," and the "law maker," all of which correspond to the Glick-Vines terminology.[67]

Ungs and Baas' empirical test of the aforementioned typology proceeded by means of Q-methodology, the inverted factor-analytic procedure developed by William Stephenson.[68] Briefly, Q-methodology is a set of psychometric and statistical procedures that allow the researcher to generate a large quantity of useful data from a sparsely populated empirical domain. In essence, the method entails the meaningful ordering of a set of statements by each member of a group of respondents. The resulting "Q-sorts" are intercorrelated and the resulting matrix factor analyzed. The emerging factors represent clusters of individuals who sorted the items similarly.[69]

The utility of Q-methodology for the study of the judicial role is obvious. Theoretically structured samples of judicial role statements are administered to judges who

must indicate their level of agreement with each statement. The factors which emerge from the analysis represent particular role orientations. These orientations may or may not correspond with the typological expectations of the researcher.

Before proceeding with a discussion of Ungs and Baas' substantive contribution to the study of the judicial role, let us dwell for a moment on the strengths and weaknesses of Q-methodology, for this procedure will figure prominently in our subsequent analysis of judicial selection and judicial role orientations.

While it is clear that the Q-method possesses great heuristic utility, one must take care to avoid the "myth of raw empiricism" or the delusion that Q is somehow more objective than the traditional approaches to behavioral inquiry. Although he is not clear on this point, Brown implies that, in executing Q, the researcher assigns no meaning to the items of the Q-sample, that he only observes and reports categories of respondent inter-subjectivity.[70] Experience with Q reveals the speciousness of such arguments. Clearly, in slelcting the inital population of items, in choosing among correlational and distributioanl options, sample selection options, alternative factor solutions and rotations and, ultimately, alternative theoretical interpretations, the researcher's subjectivity intrudes markedly into the analysis. To be fair, it must be admitted that all

forms of scientific inquiry entail some subjective judgments on the part of the researcher. In the case of Q, however, the number of such judgments is increased rather appreciably. It is therefore incumbent upon the researcher to specify and justify each judgment made in the course of using Q. Furthermore, the considerable subjectivity of Q-technique demands that Q studies be replicated by other researchers. Unfortunately, replication is a facet of the scientific enterprise that is currently undervalued in political science.

In ungs and Baas' study, forty-eight statements from the initial population of 500 were randomly selected, typed on cards and mailed to 109 judges at all levels of the Ohio state judiciary.[71] These judges were instructed to sort the statements along an eleven-point ordinal scale according to their agreement or disagreement with each item.[72] Judges were allowed to change the level of the scale to which they had assigned any given statement, thus allowing their evaluation of the first statement encountered to be affected by reactions to all subsequent statements.[73] In keeping with standard Q procedure, respondents were directed to limit the number of statements they sorted into each category of the scale.[74] The scale and "forced-choice" distribution appear below.

disagree	-5	-4	-3	-2	-1	0	+1	+2	+3	+4	+5	agree
n	4	4	4	4	5	6	5	4	4	4	4	(N = 48)

A total of fifty judges (20 appellate; 30 trial) responded with completed Q-sorts.[76] These data were correlated and the resulting 50 x 50 matrix factor analyzed using the principal components method.[77] Ungs and Baas opted for a five-factor solution which was rotated to simple structure using the varimax criterion.[78] Factors were given the following theoretical interpretation.

Factor I represented the proposed "law interpreter" role type.[79] Factor II, though impure, was interpreted as the "adjudicator."[80] Factor III resembled the "administrator."[81] Interestingly, no "law maker" type was located among the Ohio judges.[82] However, two other types not included in the original typology were "discovered." Factor Iv was labelled the "trial judge" while Factor V was dubbed the "peacekeeper."

Ungs and Baas' "trial judge" is actually a hybrid containing features of several of the originally posited types. Like the "law interpreter," the trial judge reflects a strong commitment to stare decisis. Yet the "trial judge" is also concerned with substantive justice a la "law maker." Furthermore, in his emphasis on efficiency in handling cases, the "trial judge" is not unlike the "administrator." Not surprisingly, the actual trial judges in Ungs and Baas' study tended to correlate higher with the "trial judge" factor than did the appellate judges who completed Q-sorts.[84]

The "peacekeeper" is another hybrid type not contained in the original typology. Like the "adjudicator," the

"Peacekeeper" sees the judicial task as necessarily involving the balancing of contending principles. Like the "trial judge," the "peacekeeper" is oriented toward substantive justice in particular cases. However, the small number of judges (n = 5) included in this type precludes Ungs and Baas from drawing a strong conclusion about the nature of this type.[85]

Table V shows selected statements corresponding to each of the role types Ungs and Baas identified. The complete Q-sample is contained in Appendix A.

The fact that Ungs and Baas discovered two role types not posited in the original typology demonstrates the enormous hueristic utility of Q-methodology. However, it must be pointed out that factor analysis, which is essential to Q-technique, does not reveal objective categories but creates artificial ones which are assumed to underlie the variables of the correlation matrix. Consequently, it is possible to create as many factors as there are variables in the matrix. This, of course, would be pointless. When evaluating factor solutions, one needs to determine whether factors are theoretically as well as statistically significant.

An overview of the statements characterizing each role type in Table V reveals substantial overlap among Ungs and Baas' role orientations. Is it theoretically valid to analyze the data as extensively as Ungs and Baas did, even though they were on firm statistical ground? Their results

Table V

Selected Statements Corresponding with Role Types Specified by Ungs and Baas

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Factor I: The Law Interpreter

No interpretation of the law which fails to take due account of the separation of powers can be considered constitutionally sound. (+5)

The judicial judgment must move within the limits of accepted notions of justice and is not to be based on the idiosyncracies of a merely personal judgment. (+5)

Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today. (+4)

Courts are not the only agency of government that must be assumed to have the capacity to govern. For the removal of unwise laws, appeal lies not to the courts, but to the ballot and the processes of democratic government. (+4)

Adherence to precedent must be the rule rather than the exception of litigants are to have faith in the even-handed administration of justice in the courts. (+4)

We interpret the law. That's our function. We're not authorized to write the law. We can only act in one way. That is to be solely interpreters of the law. (+3)

Stare decisis is at least the everyday working rule of the law. (+2)

Factor II: The Adjudicator.

It is the spirit and not the form of the law that keeps justice alive. (+5)

The fundamental purpose is to bring order and fair play into society; to define and to assure to each his rights; to invest business with a measure of decency; to interpose barriers against deceit, and at the same time to guard against arbitrary conduct on the part of government officials. (+5)

Table V—continued

The judicial function is to pursue justice in every case. (+5)

The function of the judge is primarily adjudication. This is not a mechanical craft, but the exercise of a creative art, whether we call it legislative or not, which requires great ability and objectivity. (+4)

The inescapable judicial task is to balance contending principles. This task requires judgment. (+3)

It is important that judges keep in continuous fruitful contact with the changing social background out of which controversies arise. (+2)

Stare decisis is at least the everyday working rule of the law. (+1)

Factor III: The Administrator

If there were no rules, we would be governed by men, not laws. Order is not only heaven's first law, but order is the essence and end of all jurisprudence. (+5)

The Anglo-American judge requires distinctive skill to work competently within the complex nature of the law. These skills may be said to be far more important than legal scholarship. (+5)

It is our responsibility, new judges and old, to clean up the accumulations of pending cases and to maintain current dockets in every court so that equal justice for all will be insured by prompt justice to all. (+4)

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. (+3)

Judges administer justice judiciously, not according to some abstract right and justice, but according to the rules laid down by society in its code of laws to which it gives its sanctions. (+2)

Factor IV: The Trial Judge

Stare decisis is at least the everyday working rule of law (+5)

Table V—continued

Adherence to precedent must be the rule rather than the exception of litigants are to have faith in the even-handed administration of justice in the courts. (+5)

The judicial function is to pursue justice in every case. (+5)

The chief function of our judicial machinery is to ascertain the truth. (+4)

Laws are designed to establish justice. Thus the protection of these laws should be the aim of the judicial task. (+3)

Our judgment cannot be rested on the hypothesis of tomorrow, but must take the facts as they are presented today. (+1)

Factor V: The Peacekeeper

Justice can be achieved by judges who consider a lawsuit not a game, the object of which is to award a prize to the more skillful of the two contestants, but as society's method of achieving social peace and justice under law. (+5)

The chief function of our judicial machinery is to ascertain the truth. (+5)

Courts governed by the rule of law may not achieve spectacular results in particular cases, but they satisfy more effectively the need of modern society for peace in the relations between the individuals composing it and between them and the state. (+5)

It is for us to meet the administration of justice in a spirit ripened by the experience of the past—with eyes fastened on the future, and the aim to achieve a better ordered life. (+4)

The judicial function is to pursue justice in every case. (+3)

Courts as an institution are too deeply imbedded in our society to take a back seat. (+1)

Note: Numbers in parenthesis represent ordinal evaluation of statements by typical representative of role orientation.

aroused our curiosity as to what we might find if the same study were repeated for the appellate judges we interviewed in Florida. Professors Ungs and Baas were kind enough to provide us with the Q-sample they developed for the Ohio study.

The methodology we used differed in certain respects from that employed by Ungs and Baas. Accordingly, our expectations differed slightly. Plans had already been made to conduct interviews with all of the judges on Florida's District Courts of Appeal in order to learn of their perceptions of merit selection and retention. We decided to administer the Ungs and Baas instrument to these judges during the interview. This meant that we chose to ignore the trial court level yet, by studying an entire population rather than a possibly quite unrepresentative sample of judges who would consent to do a Q-sort through the mail, we hoped to overcome the problem of external validity. As it turned out, only four of the forty-three judges serving on the appellate courts declined to prepare Q-sorts. Two of these four judges claimed that they felt it was improper for them to participate in such a study. With this high participation rate, we feel comfortable that our results capture the range of role types existing among Florida District Court judges (at least the range of types to which our instrument is sensitive).

The respondents in our study were given the same instructions as those in the Ungs and Baas project. The same scale

of measurement and "forced-choice" method were employed. However, in some cases judges deviated from the assigned distribution. To compensate, data were normalized. To be sure, this improved the clarity and independence of factors.

The thirty-nine Q-sorts were then correlated using the Pearson product-moment correlation coefficient. After the 39 x 39 matrix was generated, we considered several alternative factor solutions. In all cases, the principal components method of factor extraction and the varimax rotational criterion were employed.

We hypothesized that, given the fact that we were using the Ungs and Baas instrument, we would find the same set of role types, with the exception that we did not expect to find the "trial judge" since our study was confined to the appellate level. Thus we expected four factors to emerge from the data.

In the four-factor solution, the first three of the factors made sense theoretically. But Factor IV appeared to contain contrasting role orientations. A five-factor solution was produced which resulted in the breakdown of the bipolar factor in the four-factor solution. However, on further consideration, we discovered that Factors IV and V mirrored Factors I and II, theoretically although not statistically. Thus, the five-factor solution was rejected in favor of a more parsimonious three factor solution in which each sorting tendency corresponds more clearly to a theoretical role type. What follows is a discussion of each of the role types found in this solution.

Factor I The Law Interpreter: This sorting tendency corresponds nicely with Ungs and Baas' "law interpreter" role orientation. As posited, this type suggests a "narrow" and traditional conception of the judicial role, as the statements and factors in Table VI indicate.

Factor II The Justice Seeker: This type displays primary concern for discovering the truth and accomplishing substantive justice. This orientation does not correspond neatly to any of the types discovered by Ungs and Baas. However, there appears to be some overlap between our "justice seeker" and Ungs and Baas' "peacekeeper" and "trial judge" types. Yet we found no evidence that the judtice seeker tended to enter the appellate judiciary from the trial courts with any greater frequency than the other two role types we discovered (see Table VII).

Factor III The Lawmaker: Although Ungs and Baas did not find this role type in their study, we found nine appellate judges in Florida who appear to espouse this rather controversial role conception (see Table VIII).

Interestingly, no role types corresponding to Ungs and Baas' "adjudicator," "administrator," "trial judge," or "peacekeeper" were found. Only Ungs and Baas' "law interpreter" was reproduced by the Florida judges.

What factors account for the differences between the results of the Ohio and the Florida studies? Logically, the exclusion of the trial courts in the Florida study explains why no "trial judge" role type emerged from the

Table VI

Positive Items on Which Type I Z's
Are Greater Than All Other Typal Z's

	Item Description	Z-Score	Avg. Z	Diff.
8.	The judge that writes his own predilections into the law in disregard for constitutional principles or the legislative edicts that he interprets is not worthy of the great traditions of the bench.	2.32	0.32	2.00
26.	The judicial judgment must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment.	2.31	0.32	1.99
2.	If there were no rules, we would be governed by men, not laws. Order is not only heaven's first law, but is the essence and end of all jurisprudence.	1.33	-0.56	1.89
24.	Adherence to precedent must be ther rule rather than the exception if litigants are to have faith in the even-handed administration of justice.	2.03	0.32	1.71
9.	Stare decisis is at least the everyday working rule of the law.	1.23	1.13	1.10
21.	Courts are not the only agency of government that must be assumed to have the capacity to govern. For the removal of unwise laws, appeal lies not to the courts but to the ballot and the processes of democratic government.	0.62	0.06	0.56

Table VI—continued

41.	Judges administer justice judicially, not according to some abstract right and justice, but according to the rules laid down by society in its code of laws to which it gives its sanctions.	0.30	-0.20	0.50
39.	It is our responsibility, new judges and old, to clean up the accumulations of pending cases and to maintain current dockets so that equal justice for all will be insured by prompt justice . . .	1.20	0.71	0.49
34.	Our task is great. Its performance brings into play those qualities of knowledge, social idealism, courage and integrity which have always been considered the attributes of a good judge.	1.54	-1.11	0.44
27.	Our judgment cannot be rested on the hypotheses of tomorrow but most take the facts as they are presented today.	0.19	-0.22	0.41
7.	The fundamental purpose is to bring order and fair play into society; to define and assure each his rights; to invest business with a measure of decency; to interpose barriers against deceit, and at the same time guard against arbitrary conduct on the part of government officials.	0.74	0.53	0.22
46.	No interpretation of the law which fails to take due account of the separation of powers can be considered constitutionally sound.	0.52	0.43	0.09

Note: The Z-score is a measure of the correspondence between a given statement in the Q-sample and a given factor in the factor solution. In this table, we compare the correspondence of several statements to Factor I with the average correspondence of the statements to all factors in the solution.

Table VII

Positive Items on Which Type II Z's
Are Greater Than All Other Typal Z's

	Item Description	Z-Score	Avg. Z	Diff.
45.	The judicial function is to pursue justice in every case.	2.45	-0.66	3.11
25.	The crucial question is not whether the court has kept up with its calendar but whether it has kept up with justice.	1.34	-0.84	2.18
12.	Courts as an institution are too deeply imbedded in our society to take a back seat.	1.78	0.12	1.67
3.	The chief function of our judicial machinery is to ascertain the truth.	1.29	-0.35	1.65
47.	While justice is a natural virtue, it is also a social virtue. In the administration of justice, therefore, lawyers and judges must believe in, subscribe to, understand and sustain the institutions of government and must oppose any person or ideal inconsistent with those principles.	0.47	-1.14	1.60
13.	The Anglo-American judge requires distinctive skill to work competently with the complex nature of the law. These skills may be said to be far more important than legal scholarship.	0.57	-0.49	1.06
28.	It is important that judges keep in contact with the changing background out of which controversies arise.	1.05	0.02	1.02

Table VIII

Positive Items on Which Type III Z's Are Greater Than All Other Typal Z's

	Item Description	Z-Score	Avg. Z	Diff.
36.	Judges, like other leaders of thought, must be free to choose and, being free, one must have the daring to let their conscience cast the vote.	1.15	-0.65	1.80
20.	The law is not an end in itself nor does it provide ends. It is preeminently a means to serve what we think is right.	1.11	-0.53	1.64
38.	In every case where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation and appraise the substantiality of the reasons advanced.	0.93	-0.48	1.40
19.	The final cause of the law is the welfare of society.	1.28	0.04	1.25
10.	Judges, when construing statutes, necessarily engage in a species of lawmaking. The legislature often does no more than provide a general standard.	0.63	-0.34	0.97
14.	When the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history, and sacrifice custom in the pursuit of other and larger ends.	0.27	-0.66	0.94
11.	The function of the judge is primarily adjudication. This is not a mechanical craft, but the exercise of a creative art, whether we call it legislative or not, which requires great ability and objectivity.	1.20	0.34	0.85

Table VIII—continued

16.	Judges are not monks or scientists but participants in the living stream of our life, steering the law betwwen the dangers of rigidity on the one hand and of formlessness on the other.	1.04	0.19	0.85
31.	The judge should exercise discretion, informed by tradition, disciplined by system, methodized by analogy, and subordinated to the primal necessity for order in the social life.	0.21	-0.58	0.80
23.	Inevitably a judge makes law as does a legislative body; no matter how you decide a case you're making law.	0.92	0.14	0.78
30.	The inescapable judicial task is to balance contending principles. This task requires judgment.	1.36	0.62	0.74
40.	Not only should a judge be an expert in statutory construction and profoundly versed in the tenets of the common law and equity jurisprudence, but he should be endowed with fervor for substantial justice and possessed of a warm heart controlled by a cool brain.	1.57	0.90	0.68

analysis. But the most interesting difference between the studies is not so easily explained. Why did a "law maker" type appear in the Florida study when none did on Ohio? There are several plausible reasons—both theoretical and methodological—for this incongruity. Theoretically, we might argue that there are substantial differences between the political systems of Ohio and Florida. Perhaps the legal-political culture of Ohio is less conducive to the development of the law maker type than is that of Florida. Another possible explanation is the difference in time frames of the two studies. This replication of Ungs and Baas' research comes nearly a decade after the original. Perhap if the study were repeated in Ohio today a clear "law maker" would appear.

At the methodological level, the difference may be due to the fact that Ungs and Baas employed a mail survey technique while, in the Florida case, interviews were conducted with almost an entire population of appellate judges. Considering that their response rate was less than fifty percent,[86] it is conceivable that Ungs and Baas' results were not representative of the full range of role types extant in Ohio. Given that the "law maker" is a rather controversial role orientation, is it possible the "law makers" among Ohio judges simply refused to return Q-sorts?

We conclude that the Ungs and Baas Q-sample will produce varying sets of role types when it is applied in different settings. Furthermore, it is possible to "look at"

the similarities among Q-sorts in different ways using different factor solutions. Our interest in the Ungs and Baas Q-sample as an instrument to test a proposed linkage between merit selection and role expectations is enhanced considerably by this flexibility in interpretation.

Further consideration of the set of role statements apart from the Ohio and Florida typologies already discussed revealed a simple rationalist/realist polarity underlying the statements. Rationalism, as we have already stated, is characterized by an overriding concern for order and predictability. American legal rationalism, while ostensibly different from its European civil law counterpart, is typified by concern for rules of law and precedents as decisional criteria. Realism, referring here to legal realism, expresses awareness of the extra-legal factors that find their way into the law via judicial decision-making. The legal realist is much more hospitable to the notion that judges must pursue substantive justice even at the expense of stare decisis.

Given this realization, we decided to execute another factor solution—this time extracting only two factors. We have labelled these sorting tendencies the "rationalist" and the "realist." Since we are only interested in those statements which clearly discriminate between the basic two types that concern us, we have adopted a different statement selection criterion than that used in the three-factor

solution already reported. In this case, only those statements with positive z-scores on Factor I whose z-scores exceed Factor II z-scores by $z > 1.0$ will be reported as representing Factor I. The reverse holds for Factor II statements. Thus all statements whose z-scores on Factor I and Factor II differ by less than 1.0 will be regarded as concensus items. By this criterion, all but seventeen of the forty-eight statements are classified as concensus items. Nine statements have been selected to represent the "rationalist" role type; eight represent the "realist." Table IX lists the statements which characterize Factor I; Table X lists the same for Factor II. A complete statistical report for the two-factor solution appears in the appendix. Now that we have derived the simple rationalist/realist polarity, let us consider its relationship to the judicial selection variable. In his textbook-survey of approaches to the study of the judicial process, Charles Sheldon suggests the importance of linking role orientations to judicial recruitment.

> Explanation accrues when the researcher seeks to analyze the association between background and training, socialization, selection processes, and special skills— and the role or roles he has described. The selection process (formal or informal) recruits characteristic lawyers to the bench. If the selection process means anything, it means that some lawyers will be elected or appointed to the bench and others, because they lack certain prerequisites, will fail.[87]

Table IX

Key Statements and Corresponding Factor Scores Representing Factor I, the "Rationalist"

	Statement	I	II	Difference in Z
2.	If there were no rules, we would be governed by men, not laws. Order is not only heaven's first law, but the essence and end of all jurisprudence.	1.21	-0.927	2.137
8.	The judge that writes his own predilections into the law in disregard for the constitutional principles of legislative edicts he interprets is not worthy of the great traditions of the bench.	2.30	0.362	1.938
5.	Stare decisis is usually the wise policy, because it is more important that the applicable rule be settled than it be settled right.	-0.149	-2.045	1.986
26.	The judicial judgment must move within the limits of accepted notions of justice and is not to be based on the idiosyncracies of a merely personal judgment.	2.223	0.493	1.730
24.	Adherence to precedent must be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice.	1.935	0.207	1.728
9.	Stare decisis is at least the everyday working rule of the law.	1.332	-0.266	1.598
17.	Judicial power, as contradistinguished from the power of the law, has no existence. Courts are the mere instruments of the law and can will nothing.	-0.458	-1.969	1.512

Table IX—continued

42.	State courts are courts of law and not of justice. They are the symbol of the constitutionality of the people they serve.	-0.515	-1.762	1.248
31.	The judge should exercise discretion, informed by tradition, disciplined by system, methodized by analogy, and subordinated to the primal necessity for order in the social life.	-0.091	-1.115	1.024

Note: Selection criterion is difference in Z greater than or equal to 1.

Table X

Key Statements and Corresponding Factor Scores Representing Factor II, the "Realist"

	Item Description	II	I	Difference in z
45.	The judicial function is to pursue justice in every case.	1.905	-1.175	3.080
36.	Judges, like other leaders of thought, must be free to choose, and being free, must have the daring to let their conscience cast the vote.	0.928	-1.930	2.859
28.	It is important that judges keep in contact with the changing background out of which controversies arise.	1.336	-0.463	1.799
12.	Courts as an institution are too deeply imbedded in our society to take a back seat.	1.630	0.007	1.623
15.	Judges should base their decisions on broad considerations of policy which the traditions of the bench would hardly have tolerated fifty years ago.	-0.462	-1.855	1.393
32.	The law is what we say the law is to be.	-1.38	-2.506	1.126
23.	Inevitably a judge makes law as does a legislative body; no matter how you decide a case you're making law.	0.901	-0.187	1.088
16.	Judges are not monks or scientists but participants in the living stream of our life, steering the law between the dangers of rigidity on the one hand and formlessness on the other.	0.942	-0.070	1.013

Note: selection criterion is difference in z greater than or equal to 1.

What sort of prerequisites might be associated with the selection process we know as the Missouri Plan? Surveys of nominating commissions, bar associations and merit selected judges are apt to reveal such criteria as legal ability, legal knowledge, fairness, judicial temperament, conscientiousness, intellectual and moral courage and honesty.[88] The theoretical perspective we have been developing in this dissertation would suggest quite another criterion.

Put simply, our hypothesis is that merit selected judges will tend to favor the rationalist role orientation, inasmuch as merit selection is but one aspect of a more fundamental process of legal and judicial rationalization. It is not necessary, from this perspective, that bar associations and nominating commissions explicitly elicit from judicial candidates their orientations to the judicial task. The techniques of perception of role orientations of candidates may be subtle and mostly reputational. Indeed, it may be that those applicants who are invited to nominating commissions to be interviewed (i.e., those who have made the "first cut") fall within the parameters of permissibility as they pertain to role orientations.

Obviously we are susceptible to the charge that, if judicial selection cannot be shown to affect judicial output, then it is frivolous to try to explain variation in role conceptions, which are clearly related to output. Our position is that we are not seeking to indirectly explain

decision-making; we are primarily interested in the development and integration of surface norms.

Given the complexity of human behavior in an institutional framework, it is possible that mode of selection and judicial output both partially correlate with role orientations even though they do not correlate substantially with one another. Perhaps mode of selection is connected to an aspect of the judicial role not actually related to decision-making, perhaps another "role sector."

In a seminal work, Grossman discusses the relationship between mode of selection and the judicial role:

> In one sense judicial selection comes "near the end" of the judicial recruitment process. It acts to reinforce the socialization process by choosing those lawyers who have conformed to the established norms and who therefore give promise of fulfilling the judicial role in an expected manner. But though the act of selection may contribute little to the socialization of a new judge, it demonstrates visibly and effectively the types of behavior to which prospective judges ought to conform.

Grossman notes that there may be a divergence between the professed role and the operational or behavioral role of a judge. He explains the need for the maintenance of an illusory judicial role:

> Such surface norms are, of coure, quite functional in terms of the needs of the greater political system of which the judiciary is a part. They frequently include some of the more common ritualistic elements that give at least the

> appearance of continuity and stability; they serve to remind the judge as well as the public of the appropriate behaviors involved in the judicial process. A good example of this sort of "norm" is the minimization of appearances of judicial discretion.

We contend that merit selection is a mechanism for institutionalizing and rationalizing the judicial role. Presumably, this mechanism operates through the judicial nominating commissions, which give the organized bar's seal of approval to prospective judges. We already know that a dandidate's conception of the judicial task is apt to be considered by the nominating commission. Our theory envisages the commission as a means of selecting judges with the proper (in the legal sense) role orientation.

With the critical theorists, and buttressed by already cited empirical research, we retain a healthy skepticism about the effects of rationalization on court output and social effect. We may treat this matter of rationalization or institutionalization or modernization as the development of a myth—a myth in which both merit selection and a particular role orientation are crucial components.

To test our hypothesis, we return again to the judges of Florida's District Court of Appeals. As stated in Chapter II, Florida implemented merit selection of appellate judges in 1972. Of the thirty-nine judges we interviewed, twenty-six were merit selected, seven wer elected (by partisan and non-partisan ballot) and six were appointed by the

governor. Care has been taken to insure that judges have not been misclassified in terms of selection background, as this problem hampered the validity of some earlier studies of judicial selection. To test our hypothesis, we need but compare the mean factor loadings of the merit selected, elected and appointed judges. If our theory is correct, the merit selectees will tend to load higher on that factor representing the rationalist role orientation. Table XI shows such a comparison.

Table XI shows that merit selected judges do tend to favor the rationalist orientation, but only marginally. In our judgment, this apparent difference is insignificant. We do note that the elected and the appointed judges do differ rather markedly in their role orientations. This, however, can be explained as an effect of age and length of service. Appointed judges tended by far to be older and have more judicial service than their elected counterparts. Since our rationalist role orientation correlates rather obviously with political and judicial conservatism, we are seeing the older and longer serving judges espouse relatively more conservative role orientations. Why the elected judges differ so markedly from the merit selected judges is open to debate, and is not crucial to our pursuits in this dissertation. Even though we are dealing with almost an entire population, we need to bear in mind that relationships among variables measured for a

Table XI

A Comparison of Mean Factor Loadings
of Appointed, Elected and Merit Selected Judges

	Factor I The Rationalist	Factor II The Realist
Appointed (n = 6)	.481	.130
Elected (n = 7)	.145	.274
Merit Selected (n = 26)	.298	.272

small number of individuals are very unstable. One or two more elected judges with very strong role orientations could have appreciably changed the results reported in Table XI. Yet, given the substantial number of merit selected judges in our study (n = 26), we are confident that we have an accurate reading of their collective role orientations.

Notes

[1]Morton Deustch and Robert M. Krauss, Theories in Social Psychology (New York: Basic Books, Inc., 1965), p. 175.

[2]Glendon A. Schubert, "The Study of Judicial Decision-Making as an Aspect of Political Behavior," 52 American Political Science Review 1007 (1958).

[3]For critiques of Schubert's explanation of behavior in terms of attitudes, see Theodore L. Becker, Political Behavioralism and Modern Jurisprudence (Chicago: Rand, McNally and Co., 1964) and Donald W. Jackson, "The Role of the State Trial Judge: An Exploratory Study," (Ph.D. dissertation, University of Wisconsin, 1972).

[4]Becker, op. cit.

[5]Ibid., p. 67.

[6]Joel B. Grossman, "Role Playing and the Analysis of Judicial Behavior: The Case of Mr. Justice Frankfurter," 11 Journal of Public Law 285 (1962).

[7]Ibid.

[8]Ibid.

[9]Ibid., p. 295.

[10]Dorothy B. James, "Role Theory and the Supreme Court," 30 Journal of Politics 916 (1977), p. 916.

[11]J. Woodford Howard, "Role Perceptions and Behavior in Three U.S. Courts of Appeals," 39 Journal of Politics 916 (1977), p. 918.

[12]Ibid., p. 918.

[13]Ibid., p. 930.

[14]James L. Gibson, "Judges' Role Orientations, Attitudes and Decisions: An Interactive Model," 72 American Political Science Review 911 (1978).

[15]Ibid., p. 917.

[16]Ibid., p. 919.

[17]Ibid., p. 921.

[18]Ibid., p. 922.

[19]Ibid.

[20]John C. Wahlke, et al., The Legislative System: Explorations in Legislative Behavior (New York: John Wiley and Sons, 1962).

[21]Henry R. Glick, The Supreme Court in State Politics (New York: Basic Books, Inc., 1971); Kenneth N. Vines, "The Judicial Role in the American States," in Joel Grossman and Joseph Tannenhaus (eds.), Frontiers of Judicial Research (New York: John Wiley and Sons, Inc., 1969). Although they published separately, Glick and Vines conducted their research jointly in connection with Glick's dissertation research. See Glick, "Judicial Role Perceptions and Behavior," (Ph.D. dissertation, Tulane University, 1967). One article that did appear by both researchers is Henry R. Glick and Kenneth N. Vines, "Law-making in the State Judiciary: A Comparative Study of the Judicial Role in Four States," 2 Polity 142 (1969). A problem resulting from the appearance of these multiple studies is the lack of consistency in vocabulary employed in the several articles.

[22]Glick, "Judicial Role Perceptions and Behavior," op. cit.

[23]Ibid., p. 38.

[24]Ibid.

[25]Ibid., p. 37.

[26]Wahlke et al., op. cit.

[27]Larry R. Baas, "Judicial Role Perceptions: Problems of Representativeness the Identification of Types and the Study of Role Behavior," (unpublished paper presented at the 1972 Annual Meeting of the Midwest Political Science Association), p. 4.

[28]Wahlke et al., op. cit., pp. 7-14.

[29]Glick, "Role Perceptions and Behavior," op. cit., pp. 47-186.

[30]Ibid., p. 47.

[31]Ibid., p. 72.

[32]Ibid.

[33]Ibid.

[34]Ibid., p. 74.

[35]Ibid.

[36]Ibid., p. 75.

[37]Ibid.

[38]Ibid., p. 76.

[39]Vines, "The Judicial Role in the American States," op. cit.

[40]Ibid., pp. 468-469.

[41]Ibid., p. 468.

[42]Ibid.

[43]Ibid.

[44]Ibid., p. 469.

[45]Ibid.

[46]Ibid.

[47]Glick, "Judicial Role Perceptions and Behavior," op. cit., p. 122.

[48]Ibid., p. 154-159.

[49]In the history of American jurisprudence, the myth of mechanical jurisprudence was best expounded by Justice Roberts in U.S. v. Butler (297 U.S. 62) when he suggested that the judge simply places the statute in question beside the Constitution to see "whetherh the latter squares with the former."

[50]Statement of Chief Justice Marshall in Osborn v. Bank of the United States, 9 Wheat. 738, 866: 1824).

[51]Charles H. Sheldon, The American Judicial Process: Models and Approaches (New York: Dodd, Mead and Co., 1974), p. 206.

[52]Glick, "Judicial Role Perceptions and Behavior," op. cit., p. 165.

[53]Ibid., p. 155.

[54]Ibid., pp. 157-158.

[55]Ibid., p. 159.

[56]Ibid.

[57]Blick and Vines, "Law-making in the State Judiciary," op. cit.

[58]Ibid., pp. 145-146.

[59]John T. Wold, "Political Orientations, Social Back-Grounds and Role Perceptions of State Supreme Court Judges," 27 Western Political Quarterly 239 (1974).

[60]Glick and Vines, "Law-making in the State Judiciary," op. cit., p. 145.

[61]Ibid., p. 146.

[62]Ibid.

[63]Baas, "Judicial Role Perceptions," op. cit., pp. 2-4.

[64]Thomas D. Ungs and Larry R. Bass, "Judicial Role Perceptions: A Q-Technique Study of Ohio Judges," 6 Law and Society Review 343 (1972).

[65]Ibid., p. 348.

[66]Ibid., p. 345.

[67]Ibid., pp. 345-347.

[68]William Stephenson, The Study of Behavior: Q-Technique and its Methodology (Chicago: The University of Chicago Press, 1953).

[69]Stephen R. Brown, Political Subjectivity: Applications of Q-Methodology to Political Science (New Haven, Yale University Press, 1980), p. 6.

[70]Ibid., pp. 44-45.

[71]Ungs and Baas, "Judicial Role Perceptions," op. cit., p. 348.

[72]Ibid.

[73]Brown, Political Subjectivity, op. cit., pp. 194-200.

[74]Ibid., p. 201.

[75]Ungs and Baas, "Judicial Role Perceptions," op. cit., p. 348.

[76]Ibid., p. 349.

[77]Ibid.

[78]Ibid.

[79]Ibid., p. 353.

[80]Ibid., p. 354.

[81]Ibid., p. 356.

[82]Ibid., p. 363.

[83]Ibid., pp. 357-362.

[84]Ibid., p. 362.

[85]Ibid., p. 360.

[86]Ibid., p. 349.

[87]Charles H. Sheldon, The American Judicial Process, op. cit., p. 78.

[88]See, for example, Maurice Rosenberg, "The Qualities of Justices—Are They Strainable?," in Merit Retention of Judges Handbook (Tallahassee: The Florida Bar, 1976), pp. 47-64.

CHAPTER VI
CONCLUSION

In the previous chapter we discovered that, contrary to our expectations, merit selected judges on Florida's appellate courts do not favor the "rationalist" role orientation. In this final chapter we seek to explain this finding and point out directions for future empirical research in the area of judicial selection.

Assuming the validity and reliability of the data presented in the previous chapter, we can offer three plausible explanations for our negative findings. Let us begin with the most conventional of these.

As we saw in Chapter IV, political scientists have consistently failed to find substantial differences among judges selected under different modes of recruitment. Our finding fits nicely into this tradition. It may be that formal selection structures operate at a superficial level —— that the really important sources of role variation among judges are more obscure.

In their study of judicial selection and court output, Atkins and Glick conclude that "the real impact of formal judicial recruitment lies not in the empirical but primarily in a symbolic realm . . ."[1] This is a troubling statement. If the effects of merit selection are symbolic, can these

symbolic effects not be investigated empirically? After all, it is possible with Q-methodology to study a person's perceptions of symbols in a rigorous and systematic fashion. Indeed, our study has focused on role orientations, which themselves exist in a symbolic realm. If there are other symbolic effects of merit selection, then they too are susceptible to empirical research given the proper design.

What sort of other symbolic effects might attend the adoption of the Missouri plan? Certainly one impact might be a perception by the electorate as to who is controlling judicial recruitment and to what end. We have noted that the drive to adopt merit selection, eliminate lay judges, establish other formal judicial evaluation and implement other relevant reforms has been led by the organized bar. Ducat and Flango report that "states which use partisan election have the lowest ratio of lawyers per capita while Missouri Plan states have the highest proportion of lawyers per 100,000 population."[2]

In Florida, as we have noted, the Florida Bar has been very active in the judicial reform movement. Mainly due to the efforts of the state bar, which is integrated, Florida has adopted merit selection and retention, enacted a law to purge the courts of lay judges, established a judicial disciplinary commission, streamlined the court structure and is currently considering institutionalized evaluation and ongoing formal education for judges on the appellate courts.

With respect to judicial evaluation, the Florida Bar currently publishes the results of an informal bar poll to assess the merits of judges facing retention elections. The existence of the bar poll is but one more example of the bar's efforts at controlling the selection and tenure of the judiciary. Indeed, given the observed tendency for professions to seek control of their workplaces, perhaps the whole process of judicial modernization is the bar's collective effort to dominate its workplace: the courts.

Perhaps the bar's efforts in this area may not produce immediately discernable changes in the administration of justice. We must admit that no differences in judicial output or role orientations or backgrounds are attributable to the Missouri Plan. Yet other effects, perhaps of a more subtle or long-term nature, must surely attend such a dramatic change in judicial selection. One such possible effect may involve the legitimacy of the courts that are perceived to be controlled by the bar.

A second plausible explanation for our negative finding is that the process of judicial rationalization may not be complete. While the adoption of merit <u>selection</u> is surely a movement in the direction of Weber's ideal rational legal system, the existence of merit <u>retention</u> represents a compromise to appease populist elements. Given that merit retention virtually assures tenure to judicial

incumbents, perhaps there is no political necessity for merit selectees to espouse the tenets of judicial rationalsim. If merit retention were eliminated and replaced with a system of bureaucratic evaluation, then we would expect judges to feel constrained to remain within the parameters of the institutionalized judicial role. Indeed, there are rumblings at present which may lead to the abandonment of merit retention elections in favor of evaluation by a committee of judicial superiors and legal experts. We have already noted that the Florida Bar attempts to inject its collective expertise into the consciousness of the electorate to influence the outcomes of retention elections. And the Florida Bar, in conjunction with the Florida Supreme Court, is presently studying the prospect of adopting a formal, institutionalized judicial "performance evaluation" to be conducted by some permanent body of experts.

Assuming that the process of rationalization is anything but complete, we would expect that the accompanying myth of rationalization, i.e., the set of ideas that reflects the process, to be less than fully integrated. Whether subsequent reforms in the administration of justice will produce this kind of ideological conformity remains to be seen' but it remains a tenable hypothesis deserving of empirical investigation.

The final explanation we shall consider focuses on the possibility that the "realist" or "law maker" role orientations are viewed as legitimate by the legal elite and this do not require elimination by judicial selection or other administrative reform. To understand this proposition better, let us consider the origin and development of a judge's role orientation.

Following the conventional wisdom that role orientations are imparted through socialization, we related the role orientations of our Florida appellate judges (three-factor solution) to a number of background variables which the literature on judicial role behavior suggested as important. Specifically, we looked at length of judicial service, age, occupation before joining the appellate court and law school attended.

To assess the effects of the explanatory variables, we executed a stepwise discriminant analysis. Two of the discriminating variables, age and length of service, are naturally interval level variables. We incorporated the remaining two variables, "prior occupation" and "law school attended," into the analysis as dichotomous (dummy) variables. In the case of the former, the two values were "other courts" (coded "0") and "private practice" (coded "1"). All but one data point fit this dichotomy. The two values for the law school variable were "University of

Florida" (coded "0") and "others" (coded "1"). Of the judges tested in this study, roughly two out of three attended the University of Florida law school.

Considering the eigenvalue for function 1 (see Table 12), we can report moderate success in explaining role variation in terms of the studied gackground variables. We conclude that educational background, age and length of service are substantially related to role orientations. Given its contribution to Rao's V, we conclude that "prior occupation" is of minimal importance in explaining role variation. The comparison of group means on function 1 indicates that role type 3, the "law maker," is the most unique of the role types in terms of the background variables included in the analysis. The "law maker" type judges tended to be younger, have less judicial experience and less likely to have attended the law school at the University of Florida.

The relevance of this analysis to our broader concern rests on the primacy of the law school variable as a discriminator among role types. If we allow that law faculties comprise one sector of the legal elite, then, given the diversity of judicial philosophies that seem to flow from these schools, we should not expect the "realist" orientation to disappear in the face of judicial modernization. Returning to the level of social theory, we might argue that the American legal system has generated a set of

Table 12

Results of Discriminant Analysis

CANONICAL DISCRIMINANT FUNCTIONS

Function	Eigenvalue	% Variance	Cumulative %	Canonical Correlation
1*	.250	84.2	84.2	0.448
2	.047	15.8	100.0	0.212

*marks the function to be considered in remaining analysis

STANDARDIZED DISCRIMINANT FUNCTION COEFFICIENTS

Variable:	Function 1:	Contribution to Rao's V:
Law School Attended	.863	6.38
Age	.771	3.80
Length of Service	.225	0.47
Prior Occupation	.022	0.10
		10.73

CANONICAL DISCRIMINANT FUNCTION EVALUATED AT GROUP MEANS

Group:	Function 1:
1. Law Interpreter	.291
2. Justice Seeker	.221
3. Law Maker	-.877

Note: Tests of statistical significance omitted as this study embraces an entire population.

legitimate role orientations which is broader than that expected by Weber as part of the rationalization of capitalist society. This view would certainly comport with a pluralist understanding of the political system, as opposed to a rationalistic one.

A fundamental assertion of this dissertation has been that merit selection should be understood in the context of other modernizing judicial reforms. Despite the empirical findings which fail to confirm the linkage between merit selection and the rationalist role orientation, we are convinced that merit selection is but one aspect of a more fundamental process. To further empirical investigation of this premise, we might pursue several avenues of research.

One possible project would be to replicate the study we have conducted in Florida in another state, perhaps one where merit selection has been operating for a longer period of time. The role perceptions of judges in such a state could then be compared to those of judges in other states using the more traditional means of judicial selection. Of course, in doing cross-state comparison, one most carefully control for other intervening variables (like political culture differences) which might bias the results of the analysis. In selecting a state or states in which to test merit selected judges' role orientations,

perhaps we could choose one in which merit selection, but not merit retention, is employed. As we have already stated, the existence of merit retention might affect judges' professed roles.

Another more intriguing research angle would involve the construction of a scale of judicial modernization or rationalization by analyzing the several states in terms of what innovations they have adopted. Variance along this modernization scale could then be related to state socio-economic factors, size of the population of lawyers, the integration of the state bar, etc. As yet there exists no systematic study of judicial modernization, perhaps because of the enormous difficulties of data collection for the fifty states.

Whatever specific research angle is pursued, it is clear that the area of judicial reform is a potentially fruitful one. Frankly, it is something of a mystery to us why this fertile field has not been previously exploited by social scientists interested in the judicial process.

Our direction in judicial selection research is clear. We are bound to continue the investigation of the Missouri Plan both as an independent and a dependent variable. In this pursuit, we will continue to be guided by the theoretical framework developed by Max Weber. It may be that this framework will require substantial revision as new empirical results are brought to light. Such is the lot of science.

Notes

[1]Burton M. Atkins and Henry R. Glick, "Formal Judicial Recruitment and State Supreme Court Decisions," 2 American Politics Quarterly 427 (1974), p. 448.

[2]Craig Ducat and Victor E. Flango. "In Search of Qualified Judges: An Inquiry into the Relevance of Judicial Selection Research," a paper presented at the 1975 Annual Meeting of the American Political Science Association, p. 27.

APPENDIX A
Q SAMPLE AND Z SCORES: 3 FACTOR SOLUTION

	Item Descriptions	Typal Z's		
		1	2	3
	N's for each type are	18	12	9
1.	Judging is adminstration.	-1.2	-1.9	-0.3
2.	If there were no rules, we would be governed by men not laws. Order is not only heaven's first law, but is the essence and end of all jurisprudence.	1.3	-0.4	-0.7
3.	The chief function of our judicial machinery is to ascertain the truth.	0.6	1.3	-1.3
4.	Judges always made law and always will. In interpretation you're trying to give answers to problems that were not considered by the legislature, and you try to guess what the legislature would have done.	-1.0	-0.8	-1.1
5.	Stare decisis is usually the wise policy, because it is more important that the applicable rule be settled than it be settled right.	-0.1	-2.1	-0.4
6.	I take judge-made law as one of the existing realities of life.	0.2	-0.0	0.6
7.	The fundamental purpose is to bring order and fair play into society; to define and assure each his rights; to invest business with a measure of decency; to interpose barriers against deceit, and at the same time guard against arbitrary conduct on the part of government officials.	0.7	0.5	0.5

Appendix A—continued

Item Descriptions	Typal Z's		
	1	2	3
N's for each type are	18	12	9
8. The judge that writes his own predilections into the law in disregard for constitutional principles or the legislative edicts that he interprets is not worthy of the great traditions of the bench.	2.3	0.2	0.5
9. Stare decisis is at least the everyday working rule of the law.	1.2	-0.5	0.7
10. Judges, when construing statutues, necessarily engage in a species of lawmaking. The legislature often does no more than provide a general standard.	-0.4	-0.3	0.6
11. The function of the judge is primarily adjudication. This is not a mechanical craft, but the exercise of a creative art, whether we call it legislative or not, which requires great ability and objectivity.	0.3	0.4	1.2
12. Courts as an institution are too deeply imbedded in our society to take a back seat.	0.0	1.8	0.2
13. The Anglo-American judge requires distinctive skill to work competently with the complex nature of the law. These skills may be said to be far more important than legal scholarship.	-0.5	0.6	-0.4
14. When the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history, and sacrifice custom in the pursuit of other and larger ends.	-1.2	-0.1	0.3

Appendix A—continued

	Item Descriptions	Typal Z's		
		1	2	3
	N's for each type are	18	12	9
15.	Judges should base their decisions on broad considerations of policy which the traditions of the bench would hardly have tolerated 50 years ago.	-1.8	-0.3	-1.5
16.	Judges are not monks or scientists but participants in the living stream of life, steering the law between the dangers of rigidity on the one hand and of formlessness on the other.	0.0	0.0	1-0
17.	Judicial power, as contra-distinguished from the power of the law, has no existence. Courts are the mere instruments of the law and can will nothing.	-0.2	-1.7	-2.4
18.	Laws are designed to establish justice. Thus the protection of these laws should be the aim of the judicial task.	-0.3	-0.8	-0.8
19.	The final cause of the law is the welfare of society.	0.1	-0.0	1.3
20.	The law is not an end in itself nor does it provide ends. It is pre-eminently a means to serve what we think is right.	-0.8	-0.3	1.1
21.	Courts are not the only agency of government that must be assumed to have the capacity to govern. For the removal of unwise laws appeal lies not to the courts but to the ballot and the processes of democratic government.	0.6	0.1	0.0
22.	Courts governed by the rule of law may not achieve spectacular results in particular cases, but they satisfy more effectively the need of modern society for peace in the relations between the individuals composing it and between them and the state.	0.3	0.3	0.4

Appendix A—continued

	Item Description	Typal Z's		
		1	2	3
	N's for each type are	18	12	9
23.	Inevitably a judge makes law as does a legislative body; no matter how you decide a case you're making law.	-0.2	0.5	0.9
24.	Adherence to precedent must be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice.	2.0	0.3	0.3
25.	The crucial question is not whether the court has kept up with its calendar but whether it has kept up with justice.	-0.3	1.3	-1.4
26.	The judicial judgment must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment.	2.3	0.7	-0.0
27.	Our judgment cannot be rested on the hypotheses of tomorrow but must take the facts as they are presented today.	0.2	-0.4	-0.0
28.	It is important that judges keep in contact with the changing background out of which controversies arise.	-0.5	1.0	0.5
29.	The ultimate function of the judge is nothing less than the arbitration between fundamental and ever present rival forces or trends in our organized society.	-0.9	-1.4	-0.0
30.	The inescapable judicial task is to balance contending principles. This task requires judgment.	1.0	0.3	1.4

Appendix A—continued

	Item Description	Typal Z's		
		1	2	3
	N's for each type are	18	12	9
31.	The judge should exercise discretion, informed by tradition, disciplined by system, methodized by analogy, and subordinated to the primal necessity for order in the social life.	-0.1	-1.1	0.2
32.	The law is what we say the law is to be.	-2.3	-1.7	-1.2
33.	Courts are tribunals of limited jurisdiction, narrow processes, and have small capacity for handling mass litigation; they have no force to coerce obedience, and are constantly subject to being outstripped of jurisdiction.	-1.4	-2.0	-1.3
34.	Our task is great. Its performance brings into play those qualities of knowledge, social idealism, courage and integrity which have always been considered the attributes of a good judge.	1.5	0.9	1.3
35.	We interpret the law. That's our function. We're not authorized to write law. We can act in only one way. That is to be soley interpreters of the law.	-0.2	-0.3	-2.3
36.	Judges, like other leaders of thought, must be free to choose and, being free, one must have the daring to let their conscience cast the vote.	-2.1	0.8	1.1
37.	It is for us to meet the administration of justice in a spirit ripened by the experience of the past—with eyes fastened firmly on the future, and the aim to achieve a better ordered life.	0.2	0.7	1.1

Appendix A—continued

	Item Description	Typal Z's		
		1	2	3
	N's for each type are	18	12	9
38.	In every case where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation, with the circumstances and appraise the substantiality of the reasons advanced.	-0.4	-0.5	0.9
39.	It is our responsibility, new judges and old, to clean up the accumulations of pending cases and to maintain current dockets in every court so that equal justice to all will be insured by prompt justice. . .	1.2	0.9	0.5
40.	Not only should a judge be an expert in statutory construction and profoundly versed in the tenets of the common law and equity jurisprudence, but he should be endowed with fervor for substantial justice and possessed of a warm heart controlled by a cool brain.	0.5	1.3	1.6
41.	Judges administer justice judicially, not according to some abstract right and justice, but according to the rules laid down by society in its code of laws to which it gives its sanctions.	0.3	0.1	-0.5
42.	State courts are courts of law and not of justice. They are the symbol of the constitutionality of the people they serve.	-0.3	-1.9	-1.5
43.	Justice can be achieved by judges who consider a lawsuit not a game, the object of which is the award of a prize to the more skillful contestants, but as society's method of achieving peace and justice under the law.	0.4	0.5	0.7

Appendix A—continued

	Item Description	Typal Z's		
		1	2	3
	N's for each type are	18	12	9
44.	It is the spirit and not the form of law that keeps justice alive.	0.2	0.6	0.7
45.	The judicial function is to pursue justice in every case.	-1.0	2.5	-0.3
46.	No interpretation of the law which fails to take due account of the separation of powers can be considered constitutionally sound.	0.5	0.5	0.5
47.	While justice is a natural value, it is also a social virtue. In the administration of justice, therefore, lawyers and judges must believe in, subscribe to, understand and sustain the institutions of government and must oppose any person or ideal inconsistent with those principles.	-0.6	0.5	-1.7
48.	Judges must be left unshackled with more authority to rectify administrative shortcomings, not less, if they are to achieve a maximum standard of administrative efficiency.	-0.3	-0.5	-0.9

APPENDIX B
SIMPLE STRUCTURE FACTOR MATRIX: 3 FACTOR SOLUTION

Var	Factors		
	1	2	3
1	258	-119	162
2	396	649	50
3	544	-91	217
4	797	142	-151
5	280	539	101
6	644	-150	-112
7	342	23	-257
8	-55	507	184
9	375	291	437
10	-70	422	360
11	-53	17	527
12	137	298	-239
13	211	51	143
14	522	126	419
15	453	201	223
16	709	153	210
17	332	73	341
18	16	168	491
19	394	601	124
20	187	559	369
21	322	106	387
22	600	64	13
23	522	-89	-33
24	143	412	27
25	120	275	282
26	-10	454	-88
27	141	68	52
28	116	-129	592
29	-108	290	18
30	478	270	-108
31	-272	271	441
32	320	27	316
33	400	99	-11
34	403	259	390
35	520	324	173
36	246	180	474
37	-18	622	447
38	-12	527	-518
39	625	-353	318

Note: decimals omitted. 258 should be read as .258.

APPENDIX C
RE-ORDERED FACTOR MATRIX: 3 FACTOR SOLUTION

		Factors				
Seq.	Var.	1	2	3	Com.	Pure
Factor 1						
1	22	60	6	1	36	98
2	23	52	-8	-3	28	96
3	33	40	9	-1	17	94
4	4	79	14	-15	67	93
5	6	64	-15	-11	45	92
6	16	70	15	21	57	88
7	3	54	-9	21	35	84
8	27	14	6	5	2	73
9	30	47	27	-10	31	72
10	15	45	20	22	29	69
11	35	52	32	17	40	66
12	13	21	5	14	6	65
13	7	34	2	-25	18	63
14	39	62	-35	31	61	63
15	1	25	-11	16	10	62
16	14	52	12	41	46	58
17	32	32	2	31	20	50
18	34	40	25	39	38	42
Factor 2						
19	26	-1	45	-8	21	96
20	24	14	41	2	19	88
21	8	-5	50	18	29	87
22	29	-10	29	1	9	87
23	5	28	53	10	37	76
24	2	39	64	5	58	72
25	19	39	60	12	53	67
26	37	-1	62	44	58	66
27	20	18	55	36	48	64
28	10	-7	42	36	31	56
29	12	13	29	-23	16	53
30	38	-1	52	-51	54	50
Factor 3						
31	11	-5	1	52	28	98
32	28	11	-12	59	38	92
33	18	1	16	49	26	89
34	36	24	18	47	31	70

Appendix C—continued

Seq.	Var.	Factors 1	2	3	Com.	Pure
Factor 3 (continued)						
35	31	-27	27	44	34	56
36	21	32	10	38	26	56
37	17	33	7	34	23	50
38	25	12	27	28	16	46
39	9	37	29	43	41	45
Eigenvalues		7.197	3.2471	2.5499		
% Total Variance		18.44	8.33	6.54	Cumulative Total	33.3

Note: 1) Percentages of explained variance derived from unrotated factor matrix.

2) Decimals omitted from factor loadings. 60 should be read as .60.

APPENDIX D
VARIABLE ASSIGNMENTS WITH FACTOR WEIGHTS BY TYPE: 3 FACTOR SOLUTION

Var.	Weight
Type 1 (N = 18): The Law Interpreter	
1	0.2764
3	0.7734
4	2.1859
6	1.1013
7	0.3873
13	0.2213
14	0.7163
15	0.5701
16	1.4239
22	0.9368
23	0.7180
27	0.1442
30	0.6194
32	0.3569
33	0.4761
34	0.4817
35	0.7131
39	1.0240
Type 2 (N = 12): The Justice Seeker	
2	1.1209
5	0.7600
8	0.6826
10	0.5132
12	0.3269
19	0.9395
20	0.8127
24	0.4955
26	0.5718
29	0.3170
37	1.0158
38	0.7284
Type 3 (N = 9): The Lawmaker	
9	0.5407
11	0.7295
17	0.3860
18	0.6461
21	0.4544
25	0.3060
28	0.9105
31	0.5474
36	0.6105

APPENDIX E
Q SAMPLE AND Z SCORES: 2 FACTOR SOLUTION

	Item Descriptions	Typal Z's	
		1	2
	N's for each type are	21	18
1.	Judging is adminstration.	-1.0	-1.7
2.	If there were no rules, we would be governed by men not laws. Order is not only heaven's first law, but is the essence and end of all jurisprudence.	1.2	-0.9
3.	The chief function of our judicial machinery is to ascertain the truth.	0.4	0.4
4.	Judges always made law and always will. In interpretation you're trying to give answers to problems that were not considered by the legislature, and you try to guess what the legislature would have done.	-1.0	-1.0
5.	Stare decisis is usually the wise policy, because it is more important that the applicable rule be settled than it be settled right.	-0.1	-2.0
6.	I take judge-made law as one of the existing realities of life.	0.2	0.1
7.	The fundamental purpose is to bring order and fair play into society; to define and assure each his rights; to invest business with a measure of decency; to interpose barriers against deceit, and at the same time guard against arbitrary conduct on the part of government officials.	0.9	0.8

Appendix E —continued

Item Descriptions	Typal Z's	
	1	2
N's for each type are	21	18
8. The judge that writes his own predilections into the law in disregard for constitutional principles or the legislative edicts that he interprets is not worthy of the great traditions of the bench.	2.3	0.4
9. Stare decisis is at least the everyday working rule of the law.	1.3	-0.3
10. Judges, when construing statutues, necessarily engage in a species of lawmaking. The legislature often does no more than provide a general standard.	-0.3	-0.2
11. The function of the judge is primarily adjudication. This is not a mechanical craft, but the exercise of a creative art, whether we call it legislative or not, which requires great ability and objectivity.	0.4	0.6
12. Courts as an institution are too deeply imbedded in our society to take a back seat.	0.0	1.6
13. The Anglo-American judge requires distinctive skill to work competently with the complex nature of the law. These skills may be said to be far more important than legal scholarship.	-0.6	0.4
14. When the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history, and sacrifice custom in the pursuit of other and larger ends.	-1.1	-0.1

Appendix E—continued

	Item Descriptions	Typal Z's	
		1	2
	N's for each type are	21	18
15.	Judges should base their decisions on broad considerations of policy which the traditions of the bench would hardly have tolerated 50 years ago.	-1.9	-0.5
16.	Judges are not monks or scientists but participants in the living stream of life, steering the law between the dangers of rigidity on the one hand and of formlessness on the other.	-0.1	0.9
17.	Judicial power, as contra-distinguished from the power of the law, has no existence. Courts are the mere instruments of the law and can will nothing.	-0.5	-2.0
18.	Laws are designed to establish justice. Thus the protection of these laws should be the aim of the judicial task.	-0.4	-1.1
19.	The final cause of the law is the welfare of society.	0.3	0.9
20.	The law is not an end in itself nor does it provide ends. It is pre-eminently a means to serve what we think is right.	-0.6	0.2
21.	Courts are not the only agency of government that must be assumed to have the capacity to govern. For the removal of unwise laws appeal lies not to the courts but to the ballot and the processes of democratic government.	0.7	0.1
22.	Courts governed by the rule of law may not achieve spectacular results in particular cases, but they satisfy more effectively the need of modern society for peace in the relations between the individuals composing it and between them and the state.	0.3	0.5

Appendix E —continued

	Item Description	Typal Z's	
		1	2
	N's for each type are	21	18
23.	Inevitably a judge makes law as does a legislative body; no matter how you decide a case you're making law.	-0.2	0.9
24.	Adherence to precedent must be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice.	1.9	0.2
25.	The crucial question is not whether the court has kept up with its calendar but whether it has kept up with justice.	-0.4	0.5
26.	The judicial judgment must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment.	2.2	0.5
27.	Our judgment cannot be rested on the hypotheses of tomorrow but must take the facts as they are presented today.	0.2	-0.4
28.	It is important that judges keep in contact with the changing background out of which controversies arise.	-0.5	1.3
29.	The ultimate function of the judge is nothing less than the arbitration between fundamental and ever present rival forces or trends in our organized society.	-0.7	-1.0
30.	The inescapable judicial task is to balance contending principles. This task requires judgment.	0.9	0.4

Appendix E —continued

	Item Description	Typal Z's	
		1	2
	N's for each type are	21	18
31.	The judge should exercise discretion, informed by tradition, disciplined by system, methodized by analogy, and subordinated to the primal necessity for order in the social life.	-0.1	-1.1
32.	The law is what we say the law is to be.	-2.5	-1.4
33.	Courts are tribunals of limited jurisdiction, narrow processes, and have small capacity for handling mass litigation; they have no force to coerce obedience, and are constantly subject to being outstripped of jurisdiction.	-1.4	-2.1
34.	Our task is great. Its performance brings into play those qualities of knowledge, social idealism, courage and integrity which have always been considered the attributes of a good judge.	1.5	1.0
35.	We interpret the law. That's our function. We're not authorized to write law. We can act in only one way. That is to be soley interpreters of the law.	-0.3	-1.3
36.	Judges, like other leaders of thought, must be free to choose and, being free, one must have the daring to let their conscience cast the vote.	-1.9	-0.9
37.	It is for us to meet the administration of justice in a spirit ripened by the experience of the past—with eyes fastened firmly on the future, and the aim to achieve a better ordered life.	0.2	0.6

Appendix E —continued

	Item Description	Typal Z's	
		1	2
	N's for each type are	21	18
38.	In every case where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation, with the circumstances and appraise the substantiality of the reasons advanced.	-0.4	0.4
39.	It is our responsibility, new judges and old, to clean up the accumulations of pending cases and to maintain current dockets in every court so that equal justice to all will be insured by prompt justice. . .	1.1	0.8
40.	Not only should a judge be an expert in statutory construction and profoundly versed in the tenets of the common law and equity jurisprudence, but he should be endowed with fervor for substantial justice and possessed of a warm heart controlled by a cool brain.	0.6	1.5
41.	Judges administer justice judicially, not according to some abstract right and justice, but according to the rules laid down by society in its code of laws to which it gives its sanctions.	0.2	-0.1
42.	State courts are courts of law and not of justice. They are the symbol of the constitutionality of the people they serve.	-0.5	-1.8
43.	Justice can be achieved by judges who consider a lawsuit not a game, the object of which is the award of a prize to the more skillful contestants, but as society's method of achieving peace and justice under the law.	0.5	0.5

Appendix E—continued

	Item Description	Typal Z's	
		1	2
	N's for each type are	21	18
44.	It is the spirit and not the form of law that keeps justice alive.	0.2	1.0
45.	The judicial function is to pursue justice in every case.	-1.2	1.9
46.	No interpretation of the law which fails to take due account of the separation of powers can be considered constitutionally sound.	0.7	0.5
47.	While justice is a natural value, it is also a social virtue. In the administration of justice, therefore, lawyers and judges must believe in, subscribe to, understand and sustain the institutions of government and must oppose any person or ideal inconsistent with those principles.	-0.7	-0.3
48.	Judges must be left unshackled with more authority to rectify administrative shortcomings, not less, if they are to achieve a maximum standard of administrative efficiency.	-0.4	-0.6

APPENDIX F
SIMPLE STRUCTURE FACTOR MATRIX: 2 FACTOR SOLUTION

	Factors	
Var	1	2
1	0.286	-0.032
2	0.376	0.552
3	0.577	0.002
4	0.753	-0.008
5	0.274	0.493
6	0.620	-0.227
7	0.291	-0.137
8	-0.041	0.530
9	0.435	0.454
10	-0.023	0.552
11	0.037	0.295
12	0.083	0.118
13	0.231	0.106
14	0.581	0.295
15	0.477	0.260
16	0.728	0.197
17	0.383	0.221
18	0.095	0.399
19	0.388	0.550
20	0.228	0.657
21	0.380	0.274
22	0.590	0.025
23	0.511	-0.126
24	0.131	0.354
25	0.157	0.374
26	-0.043	0.339
27	0.146	0.077
28	0.221	0.194
29	-0.114	0.262
30	0.442	0.142
31	-0.203	0.479
32	0.369	0.170
33	0.388	0.053
34	0.455	0.401
35	0.530	0.334
36	0.317	0.386
37	0.037	0.764
38	-0.121	0.174
39	0.682	-0.172

APPENDIX G
RE-ORDERED FACTOR MATRIX: 2 FACTOR SOLUTION

Seq.	Var.	Factors 1	2	Com.	Pure
Factor 1					
1	3	0.577	0.002	0.332	1.000
2	4	0.753	-0.008	0.568	1.000
3	22	0.590	0.025	0.349	0.998
4	1	0.286	-0.032	0.083	0.987
5	33	0.388	0.053	0.153	0.982
6	23	0.511	-0.126	0.277	0.943
7	39	0.682	-0.172	0.495	0.940
8	16	0.728	0.197	0.569	0.932
9	30	0.442	0.142	0.216	0.906
10	6	0.620	-0.227	0.436	0.882
11	13	0.231	0.106	0.065	0.827
12	32	0.369	0.170	0.165	0.825
13	7	0.291	-0.137	0.104	0.818
14	14	0.581	0.295	0.425	0.795
15	27	0.146	0.077	0.027	0.784
16	15	0.477	0.260	0.296	0.771
17	17	0.383	0.221	0.196	0.750
18	35	0.530	0.334	0.392	0.716
19	21	0.380	0.274	0.219	0.659
20	28	0.221	0.194	0.087	0.566
21	34	0.455	0.401	0.368	0.564
Factor 2					
22	10	-0.023	0.552	0.305	0.998
23	37	0.037	0.764	0.585	0.998
24	8	-0.041	0.530	0.283	0.994
25	11	0.037	0.295	0.088	0.985
26	26	-0.043	0.339	0.117	0.985
27	18	0.095	0.399	0.168	0.947
28	20	0.228	0.657	0.483	0.893
29	24	0.131	0.354	0.143	0.880
30	25	0.157	0.374	0.165	0.850
31	31	-0.203	0.479	0.270	0.848
32	29	-0.114	0.262	0.082	0.840
33	5	0.274	0.493	0.318	0.765
34	2	0.376	0.552	0.446	0.684
35	38	-0.121	0.174	0.045	0.674
36	12	0.083	0.118	0.021	0.669
37	19	0.388	0.550	0.453	0.668
38	36	0.317	0.386	0.250	0.597
39	9	0.435	0.454	0.395	0.522

Appendix G—continued

	1	2	
Eigenvalues	7.197	3.2471	
% Total Variance	15.0	11.77	
			Cumulative Total 26.76

NOTE: Percentages of explained variance derived from unrotated factor matrix.

APPENDIX H
VARIABLE ASSIGNMENTS WITH FACTOR WEIGHTS BY TYPE: 2 FACTOR SOLUTION

	Var.	Weight
Type 1 (N = 21): The Rationalist	1	0.3119
	3	0.8635
	4	1.7415
	6	1.0077
	7	0.3183
	13	0.2440
	14	0.8776
	15	0.6180
	16	1.5509
	17	0.4492
	21	0.4441
	22	0.9061
	23	0.6926
	27	0.1488
	28	0.2326
	30	0.5492
	32	0.4269
	33	0.4569
	34	0.5740
	35	0.7375
	39	1.2726
Type 2 (N = 18): The Realist	2	0.7947
	5	0.6521
	8	0.7381
	9	0.5720
	10	0.7931
	11	0.3229
	12	0.1199
	18	0.4752
	19	0.7892
	20	1.1554
	24	0.4051
	25	0.4349
	26	0.3831
	29	0.2818
	31	0.6206
	36	0.4542
	37	1.8350
	38	0.1799

APPENDIX I
DATA FOR BAR POLL AND MERIT RETENTION ELECTION,
1978 AND 1980

	Bar Poll Results		Merit Retention Election	
1978	# of votes cast	% to retain	# of votes cast	% to retain
1st District				
Woodrow M. Melvin	792	93.3	355,176	54.9
2nd District				
Edward F. Boardman	1049	92.3	617,102	61.3
Herboth S. Ryder	659	93.3	605,567	63.3
Paul W. Danahy	685	94.5	607,671	63.2
3rd District				
Thomas H. Barkdull, Jr.	1347	90.6	265,994	68.5
Robert M. Haverfield	1065	84.4	258,369	70.4
James W. Kehoe	1157	94.3	257,298	71.8
4th District				
Spencer C. Cross	814	70.6	524,197	62.0
John H. Moore II	766	93.6	518,373	64.6
1980				
Supreme Court				
James Adkins, Jr.	2540	84.9	2,579,021	70.6
James E. Alderman	1805	90.1	2,521,931	70.7
Joe Boyd	2333	56.9	2,526,416	61.9
Arthur J. England, Jr.	2642	82.1	2,469,680	71.2
Parker Lee McDonald	1648	90.8	2,455,604	71.4
Ben F. Overton	2469	89.1	2,468,404	71.1
1st District				
Anne Cawthon Booth	815	76.2	388,393	67.6
Guyte P. McCord, Jr.	1008	91.0	382,051	66.7
E. R. (Dick) Mills, Jr.	882	87.0	379,208	67.0
Leander J. Shaw, Jr.	966	85.5	380,333	66.9
Douglass B. Shivers	564	92.0	378,822	67.4
Larry G. Smith	768	91.9	378,960	67.7
Winnifred L. Wentworth	560	83.6	376,586	67.5

Appendix I—continued

1980	Bar Poll Results # of votes cast	Bar Poll Results % to retain	Merit Retention Election # of votes cast	Merit Retention Election % to retain
2nd District				
Stephen H. Grimes	1228	92.1	783,170	75.5
T. Frank Hobson, Jr.	1094	80.8	772,400	74.5
3rd District				
Joseph Nesbitt	1090	91.7	360,145	71.9
Alan R. Schwartz	1395	90.2	351,549	71.6
4th District				
John R. Beranek	847	91.5	536,824	73.7
James C. Downey	1156	93.2	541,328	73.9
Hugh H. Glickstein	768	93.6	541,802	71.6
George W. Hersey	525	91.6	527,683	73.8
Daniel T. K. Hurley	678	92.3	532,912	74.4
5th District				
Warren H. Cobb	681	88.7	394,627	68.0
Melvin Orfinger	606	90.4	387,084	66.1
Winifred Johnson Sharp	612	85.8	388,772	67.5
Frank D. Upchurch, Jr.	744	92.2	392,472	67.8

APPENDIX J
STATISTICAL SUMMARY:
BAR POLL VERSUS MERIT RETENTION ELECTION RESULTS, 1978 AND 1980

A. Bar Poll vs. Merit Retention Results, 1978
n of cases = 9
x = % favorable vote for each judge on bar poll
y = % favorable vote for each judge in merit retention election
regression equation: y = 64.31933 + 0.0014 (x)
correlation (r) = 0.00209 coefficient of determination (r^2) = 0.0000
attained significance level = 0.49787

B. Bar Poll vs. Merit Retention Election Results, 1980
n of cases = 26
x = % favorable vote for each judge on bar poll
y = % favorable vote for each judge in merit retention election
regression equation: y = 49.94137 + 0.22967 (x)
correlation (r) = 0.53045 coefficient of determination (r^2) = 0.28138
attained significance level = 0.00265

NOTE: The statistical results for the 1978 election are not very reliable given the small number of cases. Indeed, had more candidates run in that election the results might have been significantly different. But the results for the 1980 election with 26 cases are on solid statistical ground, as can be inferred from the attained significance level reported in Table 28.

APPENDIX K
METHODOLOGICAL GLOSSARY

I. Q-Methodology and Factor Analysis:

eigenvalue: root obtained in solution of linear equation involved in extraction of factors from correlation matrix. The eigenvalue indicates the "strength" of the factor it is associated with.

factor loading: the correlation between an individual and a factor derived from the inter-correlations of all individuals in the study.

factor score: the correspondence between an item of the Q-sample and an extracted factor. In our study, the factor score is labelled "Z."

principal components analysis: a method of factor extraction involving the extraction of the maximum amount of variance as each factor is calculated.

P-sample: the sample of individuals participating in a Q-method study.

Q-sample: the sample of statements used in the Q-method study.

Q-sort: the ranking of the statements of the Q-sample as performed by a member of the P-sample.

varimax rotation: for the purpose of interpreting factor loadings, the rotation of the reference axes under the constraint that the axes remain perpendicular to one another, thus implying uncorrelated factors.

II. Discriminant Analysis:

function: a mathematical statement indicating the relationship of a set of discriminating bariables to a dependent variable that represents group membership such that the function maximally discriminates the members of the groups.

eigenvalues: the roots obtained in the solution for the discriminant functions.

canonical correlation: a multiple correlation relating several dependent to several independent variables. The canonical correlation has the same proportional reduction of error interpretation as the Pearson product-moment correlation.

Rao's V: a generalized measure of "distance" between groups, i.e., a measure of discrimination.

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I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

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